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INSTITUTES
OF
NATURAL LAW:

Being the substance of a

COURSE OF LECTURES

ON

Grotius de Jure Belli et Pacis,

READ IN S. JOHN'S COLLEGE
CAMBRIDGE.

BY *T. RUTHERFORTH.* D.D. F.R.S.

ARCHDEACON OF ESSEX, &c. &c. &c.

VOL. I.

In which are explained,

THE RIGHTS AND OBLIGATIONS OF MANKIND,
CONSIDERED AS INDIVIDUALS.

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INSTITUTES
OF
NATURAL LAW.

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INSTITUTES

OF

NATURAL LAW.

CHAPTER I.

Of Law in General.

- I. *What is meant by a law.* II. *Permissions are not laws.*
 III. *In what respect they may be considered as laws.*
 IV. *Why they have been thought to be laws.* V. *Laws either natural or voluntary.* VI. *Cause of obligation to observe natural laws is foreign to our present enquiry.* VII. *A short account of the cause of obligation.* VIII. *Voluntary laws either divine or human.* IX. *Divine voluntary laws.* X. *Difference between law of nature and divine positive laws.* XI. *Human voluntary laws of three sorts. Civil law what.* XII. *Human laws of less extent than civil law.* XIII. *Law of nations.*

I. **A** Law^a is a rule to which men are obliged to make their moral actions conformable. The word law has indeed a much more extensive signification: all rules, from which any beings whatsoever either will not, or cannot, or ought not to deviate, are so many laws to them. The rules, which God has set

What is meant by a law.

^a Grot. Lib. I. Cap. I. §. IX.

to himself to work by ; the rules, which brute creatures are led by their instinct to obey ; and the rules, which inanimate matter in its motions and operations cannot but observe, are usually called the laws of their several natures. But since it is not our business, in the following work, to enquire into the rules, which God, before all ages, has set down to himself, for himself to work by ; or into those, which the instinct of brute creatures imposes upon them, or into those, which necessarily determine the motions and operations of inanimate matter ; but into those only, which men are bound to observe ; it was proper, in defining the word law, to restrain it to this sense. Neither are all the actions of men subject to the natural law, which we are enquiring after ; but those only, which are called moral actions ; that is, those only, in which men have knowledge to guide them, and a will to chuse for themselves. This is the reason for restraining the law still farther, by defining it to be a rule for the moral actions of men. It was necessary likewise to include obligation in our notion of a law, and to define it to be a rule, which men are obliged to observe ; because all the rules, which men observe, even in their moral actions, are not laws. Counsel, or advice, which they may follow or neglect at their own discretion ; rules of convenience or prudence, which they may observe or not, as their own inclinations lead them ; if they are ever called laws, are called so improperly.

Permissi-
ons are not
laws. II. By making obligation a necessary part in our notion of a law, all ^b permissions are, as they ought to be, excluded from being laws. Though permissions may

^b Grot. Lib. I. Cap. I. §. IX.

come from the maker of a law, and may be established by his authority, yet they are rather negations of law than acts of it : instead of being operations of the law, they are checks upon its operation.

Permissions are of two sorts, they arise either from the silence of the law, or from its express declarations. All laws are understood to permit such actions as they are silent about : we are permitted to do whatever the law does not forbid ; we are permitted to neglect whatever it does not command. There can be no question, whether such permissions as these are to be called laws : for certainly the silence of the law can never come within the notion of law. And as to the other sort of permissions, those which arise from express declarations of the law ; what are they but declarations, that the law is not designed to extend to the privileged case ? Mankind, if they were under no law, would be at full liberty to act in what manner they pleased. But suppose a law to be made commanding them to do this, or that ; the liberty of all, who are subject to the authority of such law, is then restrained, and they are obliged to act as the law prescribes. Suppose farther the same law to declare, that such particular persons, or that persons in such particular circumstances, are permitted to do otherwise ; the effect of such a declaration is, that the privileged person, or that the persons in the privileged circumstances, are left in the same condition, as if no law at all had been made : they are, notwithstanding the law, at liberty to act in what manner they please. And it is not easy to imagine with what propriety such a permission can be called a law, as leaves them at their full liberty, and places them in the same condition, that they would have been

in, if the law had done nothing either one way or the other. Such a permission comes indeed from the law-maker, and is established by his authority. But then it is plain how his authority operates. Its operation is to check the obligation of his law, and to prevent its extending to such persons, or to such cases as it would have extended to, if he had not checked it.

From what has been already said, it will appear, that, though we distinguish between permissions, which arise from the silence of the law, and permissions, which arise from the express declarations of it; yet both of them are nearly the same in their effect. The principal difference between them is in their extent. All men are at liberty to act as they please, where the permission arises from the silence of the law. But they only have this full liberty, to whom the permission is granted by the law, where the permission arises from its express declaration. Perhaps the following instance may help to make this matter more intelligible. Suppose the local statutes of any College in either of our Universities neither to have commanded nor forbidden the fellows of such College to enter into holy orders, but to have been wholly silent upon this head. Every one will see, that those fellows are permitted to act in this respect, as they please, and are at liberty either to enter into holy orders or not, at their own discretion. The founder of the College, or other person, who has a right to change their statutes, alters his mind, and enjoins, that they shall all be in holy orders at a certain age, under the penalty of forfeiting their fellowships. They are then no longer at liberty to chuse for themselves, but must either lose their fellowships, or enter into holy orders. After

some experience this law is found inconvenient, and the same authority, which established it, repeals it. The fellows are then at liberty again as they were at first ; they are permitted either to enter into holy orders or not, just as they please. And this permission is plainly owing, not to any new law, but to a repeal of that, which was formerly made. It arises indeed from an act of the law-maker ; but it is from such an act as only makes void what he had done before. But suppose him, instead of having repealed his former law, to have granted a dispensation to two of the fellows to continue laymen, if they please. Such a dispensation is a permission arising from the act of the law-maker : but we cannot with any propriety call it a law, in respect of those two of the fellows, to whom it is granted. Its effect is plainly a repeal of the law in respect of them : and if a repeal of a law, where it is universal, cannot be called a law ; there is no reason why it should be called so, where it is partial. A permission to all the fellows, arising from the silence of the statutes, is plainly no law. A permission to all the fellows, arising from the repeal of the statutes, is plainly no law. The only difference between either of these cases, and the case of a permission to two of the fellows, is, that only these two enjoy that liberty in this case, which all of them would have enjoyed in either of the other. And it will, I apprehend, be necessary to find out some other difference besides this, before any satisfactory reason can be shewn, why permissions arising from the original silence or total repeal of the law, are not laws ; but permissions arising from an express dispensation or a partial repeal of it, are to be looked upon as laws.

In what
respect
permis-
sions may
be confi-
dered as
laws.

III. But though permissions do not operate as laws, in respect of those persons, in whose favour they are granted; yet they have the operation of laws, and ought to be considered as laws, in respect of others, who are bound not to hinder those persons from the full enjoyment of that liberty, which such permissions allow. Thus, in the instance just now made use of, the governors of the College are bound by the dispensation, granted to two of their fellows from entering into holy orders, to suffer these two fellows quietly to enjoy their places or fellowship, notwithstanding the general statute obliging the rest of them to be in holy orders at a certain time, under the penalty of a forfeiture; though the fellows, who are thus privileged should continue laymen beyond the time so limited. Permissions therefore, tho' they are not laws in one view, are laws in another view. In respect of those persons, to whom, or in whose favour they are granted, they are checks upon the law: in respect of others, who, if no such permission had been granted, might have lawfully hindered these persons in the exercise of that liberty, which it allows, they are acts of the law. They are not laws, as far as they allow a liberty of action: they are laws, as far as they include the notion of obligation.

Why per-
missions
have been
thought to
be laws.

IV. One reason why permissions, even in respect of those persons, who claim a liberty of acting in virtue of them, have been mistaken for laws, has probably been, that where they arise from express declarations of the law, they are established by the authority of the law-maker. But that his establishment of them will not be sufficient to give them the nature

of laws will be evident, upon recollecting in what manner his authority operates in their establishment. It operates only so as to check itself, and to hinder the law from extending so far as it would have extended, if he had not granted the dispensation or privilege. And it may be questioned, whether a privilege or permission, in this view of it, can be properly said to be established: unless we mean, that by the grant of such privilege the liberty of those persons is established, which the law would have taken away, unless the privilege had been granted.

Another reason, why permissions have been mistaken for laws, is that privileges and rights are derived from them. And since privileges and rights are supposed to be positive things, it is imagined, that permissions, upon which they are founded, must be looked upon as positive acts, and not as mere negations of law. But then we must observe, that if there was no law at all; there would be no difference between privileged persons and others; all men would be equally at liberty to act in the same manner. It is therefore the restraint, which the law has laid upon others, and not the grant of any thing positive to the privileged persons, which puts the difference between these persons and others. And a privilege, in this view of it, can no otherwise be considered as a positive thing, than as it is a reserve of that liberty in favour of the privileged persons, which the law has taken away from others not privileged. But such a reserve as this is plainly no act of the law; it is only a check upon it, and hinders it from acting. Many of our rights, it must be allowed, are derived from permissions. But this can be no reason for esteeming

permissions to be positive acts of the law: unless the silence of a law can be called a positive act of it. Since as many of our rights are derived from permissions, which arise from the silence of the law, as from permissions, which arise from its express declarations. A right is indeed nothing more than a liberty of doing certain actions, or of possessing certain things consistently with the law. We have therefore a right to do such actions as the law does not forbid us to do, and to possess such things, as the law does not forbid us to possess. And it seems impossible for any one to conceive, that the laws not forbidding us to do an action, or to possess a thing, should be an act of the law. This is the case, where our rights are founded upon permissions arising from the silence of the law: and it is much the same, where they are founded upon what are called positive grants, that is, upon such permissions, as the law expressly declares. An express declaration of what the law allows is no more than an express declaration of what it does not forbid. In one view indeed a permission, upon which any right is founded, may be looked upon as an act of the law: though in respect of them, whose right it is, the permission is only a negation of law, yet in respect of others it operates as a law: because it restrains all others from interrupting them in the free enjoyment of what is so permitted.

Laws either natural or voluntary.

V. ^c Laws are divided into two sorts, natural and voluntary. Natural laws are those, which mankind are obliged to observe from their nature and constitution. Voluntary laws, or, as they are sometimes called, positive laws, are those, which mankind are obliged to observe by the immediate will and appointment of a superior.

c Grotius *ibid.*

VI. As it is the principal design of the following treatise to trace out the rules, which mankind are obliged to observe from their nature and constitution; there does not seem to be any great necessity for entering into the question concerning the cause of our obligation to observe these rules; a question upon which moralists are so much divided in their opinions. However they may differ about the cause of obligation, they are agreed about the law, to which we are obliged; whilst they dispute about the reason of duty, they concur in establishing the same rules of duty. The moralists of one sect derive our obligation to observe the law of nature from instinctive affections, or an innate moral sense. Those of another sect maintain, that all our obligations of this sort arise from certain abstract relations or fitnesses of things. A third sect are of opinion, that we cannot be steadily and constantly obliged to the observance of that law, but from the assurance of being made happy, for observing it, by the will and appointment of God. And a fourth sect think it necessary to join all these principles together, in order to render the obligation perfect. But all these different sects agree in contending, that the law of nature, which we are obliged to observe, prescribes piety towards God; justice and benevolence in respect of mankind; and chastity and temperance in respect of ourselves. But as the rules of duty are the proper subject of our present enquiry, and all moralists are agreed about these rules, however they may differ about the cause, which obliges us to the observance of them; we might pass over this question entirely, without being liable to be charged with neglecting what necessarily belongs to

Cause of
obligation
to observe
natural
law is for-
eign to
our pre-
sent enquiry.

our subject: or if we say any thing about it, those moralists, who are not of the same opinion with us, must own, that the proper subject of the following treatise is not affected by it.

A short
account of
the cause
of obligation.

VII. But though it is not necessary to speak at large concerning the cause of moral obligation, and to enter minutely into the disputes, which have been raised upon that head; yet it may not be improper to say something about it. I shall therefore endeavor to shew, in as few words as I can, for what reason we are obliged to the duties of piety towards God, of justice and benevolence in respect of mankind, of chastity and temperance in respect of ourselves. It is, I suppose, an undoubted truth, that all men are desirous of happiness. And I shall farther take it for granted, that when any practice appears to be so connected with our happiness, that we cannot obtain the one without following the other, we are then as strongly obliged to that practice, as we can be. Whatever rules therefore are, by our own nature and the constitution of things, made necessary for us to observe, in order to be happy, these rules are the law of our nature. Now man, as an individual, unconnected with the creatures of his own species, not joined with them in a common interest, having no other provision or conveniency but what his own labour could produce, having no prudence but his own to contrive for himself, and having no strength but his own to defend him, would be unable to obtain such a degree of happiness, as his nature prompts him to desire, and much more unable to obtain such a degree, as his nature is capable of. It is therefore the law of his nature, that he should live in society with others of his own species: by which I do

not mean, that he should merely live in company with them, as many brute creatures are observed to herd together ; but that he should join with them in a common interest, that he should bind himself to them in such a manner as to labour with them for a general good. For without such a connection of interests, he cannot make use of a joint or common wisdom to contrive for his own good, nor of a joint or common strength to secure himself in the possession of it. So that although his own particular happiness be the end, which the first principles of his nature teach him to pursue ; yet reason, which is likewise a principle of his nature, informs him, that he cannot effectually obtain this end without endeavouring to advance the common good of mankind ; but must either be contented to enjoy his own happiness, as a part of the general happiness, or not enjoy it at all.

When he discovers farther, that there is a God, who made and governs the world, to whose power he owes his being, and to whose goodness he owes all the happiness, that he either does or can enjoy ; and when he learns besides, either by the use of his reason, or by express declarations from the maker and governor of all things, that he is not to cease to exist, when he passes out of this present life, but that his being will be continued to him in another ; the same desire of happiness, which obliged him to pursue a general good, and to keep his interests by this means united to the common interests of his species, will oblige him to observe all these rules in his moral conduct, which he finds to be necessary, in order to secure the favour of his maker, and his own welfare in the life after this. He will plainly understand, that the most

effectual way to secure the latter point, is to secure the former, that he is most likely to obtain this future happiness, by putting himself under the protection of that Almighty being, who is the disposer of all things. Nor can he have any hope of engaging the protection of God, but by endeavouring to please him, or by obeying his will, as far as he can discover what his will is. But since, from a view of what is before him it appears, that God has made his nature and constitution such, as requires him, if he would be happy here, to work for a general good, or for the common interest of his species; the most reasonable conclusion is, that God, who made his nature and constitution what it is, expects him thus to work; and that, by thus endeavouring to do the work, which God expects him to do, he takes the most effectual method of securing whatever happiness can be hoped for hereafter.

But besides the general desire of happiness, he finds within himself certain appetites, which lead him to some particular sorts of pleasure, and that a part of his happiness, whilst he is here, consists in the gratification of these appetites. But then he finds likewise, that, if he indulges himself to excess in such pleasures, the excess is attended with pains and diseases, and that if he gives himself up to those pleasures, he becomes either useless or hurtful to his species. From either of these discoveries he may collect, that he cannot be as happy, as he naturally desires to be, or that he cannot obtain his greatest good, unless he takes care to restrain his appetites within proper bounds. For since the pain and diseases, which attend the too free indulgence of them, arise from his nature and consti-

tution, excesses of this sort are contrary to his nature and constitution, and consequently are contrary to the will of that being, who made his nature and constitution what they are. And since the same excesses interfere with the common good of his species, by making him either useless or hurtful, they are upon this account likewise contrary to his nature and constitution, which he finds to be such, that he cannot obtain his own particular happiness without endeavouring to promote the common happiness of his species.

Upon the whole, mankind are naturally desirous of making themselves as happy as they can; and whatever rules are by their nature and constitution made necessary for them to observe, in order to obtain this greatest good, are the law of their nature. And these rules have been shewn to consist, first, in piety and reverence towards God, who is the maker and disposer of all things; secondly, in justice and benevolence towards one another, or in working for a common interest, by taking care to do no harm, and by endeavouring to do good; and, thirdly, in restraining their appetites by chastity and temperance, so as neither to hurt themselves nor others, by the improper indulgence of them.

In tracing out the obligation arising from the law of nature, to observe these duties, I have taken the expectation of a life after this into the account; without considering, whether we come to the knowledge of such a life by the use of our reason, or by some express revelation, which God has made to us. Nor do I think it necessary to enter here into any debate upon this head; because by whatever means we are inform

ed of this fact, that there will be a future life, such a life is equally a part of our nature, and of the constitution of things; and all the consequences relating to our practice, which can be deduced from it, are equally the laws of our nature. It may perhaps be urged, that the law of nature is a law, which reason discovers to us, and that upon this account revelation cannot fairly be made the foundation of it. But whoever is disposed to make such an objection as this, should consider, in what sense reason is said to discover the law of nature: it does not discover all the facts from whence it deduces this law. Many of them are learned by our own experience, and many more depend upon the experience of other men, and are conveyed to us by their testimony. Whoever would be truly and fully informed of the nature and constitution of the human species, must make use of these means: and after he is thus informed of the facts, his reason traces out from thence the rules, which such a nature and constitution obliges mankind to observe. The use of reason, in tracing out those rules, will, as far as I can see, be precisely the same, whether he is informed of the facts relating to the nature and constitution of man, by his own experience and the testimony of other men, or whether he joins to these helps the much surer testimony of God.

Voluntary
laws either
divine or
human.

VIII. ^d As voluntary laws are rules prescribed to mankind, by the immediate authority of a Superior; they must necessarily be either divine, or human: because the only superiors, that we know of, are either God who is the author of our being, or such of our own species; as have a right to direct our conduct.

^d Grot. *ibid.* §. XIII.

IX. ^e Divine voluntary laws are such rules, as we are obliged to observe by the immediate command and authority of God. These laws are either of partial or of general obligation; they are either such as oblige only one particular people, or such as oblige all mankind. We know of but one instance of a divine voluntary law, which was confined to a single people; and that is the law, which God gave to the Israelites by Moses. It is evident, that the positive parts of this law were never obligatory upon any people, except the Israelites: both because the law is addressed to them only; and because the principal observances, which it enjoined, and many of the rewards, which it promised, were confined to the country, where they lived. A voluntary law can oblige no farther than the law-maker intended, that it should oblige: because all the authority, that it has, is derived only from his will and intention: so that wherever this will or intention stops, the obligation of the law must stop with it. Now the intention of God, in giving the Mosaic law, does not appear to have extended beyond the Israelites; for the law is addressed to them alone. Hear O Israel, says the legislator, the Lord thy God is one Lord. And as the intention of the law-maker thus confined it to that one people, so the matter of the law and the sanctions if it are, in many instances, such as confine it in the same manner. Some of the feasts, which it appoints, could not be celebrated; some of the sacrifices, which it commands, could not be offered; some of the ceremonies, which it prescribes, could not be observed, at any place, except at Jerusalem. The promises of liv-

Divine voluntary
worship.

ing long in the land, which God had given them, the promise, that when all their males went up to Jerusalem three times in a year, none of their neighbours should invade their country, the general promises, that God would bless them more than any people, are all of them in their own nature limited to the Israelites; and some of them are limited not only to the Israelites, as a particular people, but as a people settled in that particular country.

As this law was never obligatory upon any other nation, besides the Israelites, so, since the preaching of the Gospel, it is not obligatory upon them. This was expressly declared by the council of the apostles at Jerusalem, and is frequently repeated by St. Paul in most of his epistles. We are to observe however, that the Mosaic law may be distinguished into three parts; that many of its precepts are purely political, and were designed to regulate and establish the civil government of the Israelites; that many of its precepts are ceremonial, and were designed to settle the outward forms of religious worship; but that some of its precepts are moral, and are only parts of the law of nature. Now whilst we affirm the Mosaic law to have been never obligatory upon any besides the Israelites, and not to be obligatory at present even upon them; we must remember, that the moral precepts of it did always oblige, and still continue to oblige all mankind; not because they are parts of the Mosaic law, but because they are transcripts of that natural law, which was, and always will be of universal obligation to all men, as being derived from their nature and constitution.

Whatever positive laws were given either to Adam or to Noah, as the common parents of all mankind, would be of universal obligation, if we could come to the knowledge of them because the commands of God to them, as the representatives of the species, one at the creation, and the other after the flood, necessarily extend to that whole species, which they represented.

All such positive laws, as are contained in the Gospel, are likewise of universal obligation : because the author of it, and they who first preached it, by his appointment and under his direction, declare, that all men are obliged to receive it.

There does not seem to be any occasion to prove, that we are obliged to observe such positive rules, as God is pleased to prescribe. Since to us his authority over us, and his power to make us happy or miserable, are such apparent and effectual causes of obligation, that the most slight observer cannot want to have them pointed out or enforced.

X. Before we pass on to the consideration of human laws, it may not be improper to state and explain the difference between the law of nature, and the positive laws of God. ^{Difference between law of nature, and divine positive laws.} This difference will be best understood, if we consider what it is, which makes any intelligible distinction between moral and positive duties. When the law of Moses, for instance, forbids murder, and when it forbids the Israelites to eat the flesh of such animals, as it determines to be unclean; what is it, which makes one of these a moral and the other a positive precept? This point is not at all cleared up by

f Grot. *ibid.*

saying, that one of these is a precept of the law of nature, and the other is not so : for this, instead of bringing us forward in removing the difficulty, only carries us back to the place, that we set out from. We cannot say, that moral and positive duties are distinguished from each other, by the different authority, which establishes them : because the same God, who binds us to the observance of the law of nature, binds us likewise to the observance of his own positive laws. Neither can we say, that they are distinguished from one another by the different sanctions, upon which they are established : because happiness to those, who obey them, is the common sanction of duties of both sorts. This is plainly the case both in the Gospel and in the law of Moses ; where moral and positive duties are enjoined under like penalties. We cannot therefore look for the difference of these two sorts of duties here ; unless we will maintain, that every moral duty becomes a positive one, whenever God is pleased to establish such moral duty by any express promise of a reward to them, who perform it.

The principal mark of difference is to be found in the matter of the duties. The actions of men are, in their own nature, either good, or bad, or indifferent. Such actions as in themselves, or of natural consequence, tend to promote a common interest, or to prevent a common harm, are called morally good : they make a good part in the behaviour or morals of those persons, who do them ; because they are productive of good or happiness to mankind. Such actions, as in themselves, or of natural consequence, tend to hinder a common good, or to produce a common harm, are morally bad : they make a bad part in the morals or behaviour of those persons who do them. Such actions

are indifferent, as do not affect the general good or welfare of others, either one way or another; such as in themselves, or of natural consequence, neither prevent harm nor do good, neither prevent good nor do harm. The law of nature, as has been shewn already, enjoins all those actions, which are morally good, and forbids all those which are morally bad. By this means the former become duties, and the latter crimes. And if God, in any express revelation of his will to mankind, has been pleased to recite any part of the law of nature, and to establish it by any new sanctions; still the nature of the duties so recited and established continues the same; and the actions thus enjoined, being morally good, are called moral duties. But when any actions, which are indifferent in themselves, are commanded or forbidden by any express revelation of God's will; those actions likewise, which God thus commands, become duties, and those actions which he forbids, become crimes: however, as the actions in themselves, or in their own nature, affect the common good of mankind neither one way nor other, as they have nothing in them either morally good or morally bad; this sort of duties is called positive duties. Thus in respect of God, fear, and love, and reverence are moral duties; because they tend to promote a common good, since the obligations, that we are under to work for this end, depend upon our knowing it to be his will, that we should so work; and unless we fear and love and reverence him, his will would not appear to be a law to us. But the particular forms or ceremonies, the particular times and places appointed for expressing these sentiments, are of a positive nature. Temperance and charity, as they tend to promote a common good, or to prevent a common harm, are

moral duties. But any extraordinary restraints upon our appetites, which have not such a tendency, are duties of a positive sort. In short, since all such actions as are good in themselves, in the sense already explained, are called virtues ; and all such, as are bad in themselves, are called vices ; we may say in general, that all virtues are moral duties, and all vices are moral crimes ; or that virtue and vice are the matter either of the law of nature, or of God's moral law, which enjoins the former, and forbids the latter. But such actions, as are indifferent in themselves, such as in their own nature are neither virtuous nor vicious, are the proper matter of God's positive law ; they become duties, when he commands them, or crimes, when he forbids them.

I would not be understood to mean, that the observance of God's positive commands does not at all affect the general good of mankind, after he has been pleased to give those commands ; or that the common interest is not concerned ; whether they are observed or neglected. There is certainly thus much of morality even in all positive duties ; that any habitual neglect of them is inconsistent with the fear, and love, and reverence, which are due to God, and which are the surest establishment of the whole law of nature : so that they, who pretend to despise all positive duties, as if they were of little or no importance, would do well to consider, that they may justly be looked upon as enemies to the general good of mankind ; in as much as they lessen the authority of God, and weaken the firmest support of all moral virtue.

From the difference between the moral and the positive laws of God, in respect of the matter of those laws, another mark of difference arises, in respect of

the means by which we do or may arrive at the knowledge of them. The moral law of God commands all such actions as in themselves, or of natural consequence, are productive of general good, and forbids all such, as, in themselves, or of natural consequence, are productive of general harm. Now the experience and the reason of mankind may discover this natural difference between virtue and vice, or between good and bad actions: and consequently it is possible, in the nature of the thing itself, for mankind, by the use of their reason, to trace out the rules of moral duty. But then in respect of positive duties, which consist of such actions as are in their own nature indifferent, or of such actions as do not appear to us to be productive of either good or harm to mankind, our reason can be no guide to us. For certainly reason can never distinguish the duties from the crimes, without some express declaration of the will of the law-maker, where nothing but his will makes any apparent difference between those actions, which are commanded, and those which are forbidden.

Though I have here said, that it is possible for mankind, by the use of their reason, to trace out the rules of moral duty; I would not be understood to intimate, that in respect of our moral duties all revelation is useless. In respect of these duties revelation may and does answer very useful and necessary purposes. In the nature of the thing itself, such actions as are moral duties, may be distinguished from such, as are criminal: because there is a natural difference between them. But then as this difference consists in the good or harm, which arises from our actions; long experience, close attention, and accurate reasonings are necessary to discover it. So that however

possible it may be, in the nature of the thing itself, for mankind to trace out the rule of moral duty, without the assistance of revelation; it is in fact very unlikely, that they should do it, without some such assistance. The life of any one man is too short, his observations too few, his attention too much taken up with other matters, to search into the nature and consequences of all human actions, and by general reasonings to establish a rule of duty. This would be the case, supposing we were all of us to employ ourselves in this enquiry with as much diligence as the circumstances of human life would admit of. Even upon this supposition we must have recourse to the experience and reasonings of those, who have gone before us. But in general we have neither diligence, nor skill enough, to go through such an enquiry: the bulk of mankind would never find out their duty, if they were not taught it; they would never give themselves the trouble of looking for it, if it was not laid plainly before them. In this instance therefore revelation will be useful in respect of moral duties. It will help to teach the rule of duty, even to those who are the most diligent enquirers; because as the knowledge of God is infinitely superior to our own, his declarations about the nature and consequence of our actions will be a surer guide to us than our own experience and reasonings can be. And wherever he has been pleased to point out our duty to us, neither want of leisure nor want of skill can prevent us from seeing it. This then is the first use of express revelation, in respect of moral duties. It assists the learned in their enquiries, and instructs the ignorant, who without such instructions would have known little or nothing of it. But such a revelation is of use not

only in publishing the rule of duty, but more especially in establishing the obligations of mankind to observe this rule, by instructing them in the full knowledge of God and themselves, by informing them what their true condition is at present, and by what means the wisdom and goodness of God designs to lead them to happiness hereafter. But I am entering too far into the province of theology; and must ask the reader's pardon for this digression.

XI. ^g Human voluntary laws are of three sorts; Human
voluntary
laws of
three sorts.
Civil laws
what. either the civil law, or a law of less extent which is not derived from the civil power, or a law of greater extent than the civil law. The civil law is a rule established by the civil power, to which the subjects of any nation, who are under the authority of its civil power, are obliged to conform their behaviour. By the civil power we mean that power, which governs what in latin is called *civitas*, in english a state, a nation or a civil community. And by a nation or civil community we mean a complete or perfect society of men, who are in possession of their personal liberties, and have united themselves into one body for the purposes of securing their rights, and of promoting a common interest. The name *civil law* is now almost appropriated to the civil law of the Roman empire; as this has long been called so by way of eminence, whenever we speak of the civil law, we are supposed to mean this. But whenever I have occasion to speak of this law, I shall call it the Roman law, and shall use the words *civil law*, in the most extensive sense, for the law of the land in each particular nation or country, that is for the law which the civil power in that nation or country has established.

^g Grot. *ibid.* §. XIV.

Human
law of less
extent than
the civil law

XII. ^h Human voluntary laws, which are of less extent than the civil law, and are different from it, as not being derived from the same power, are the rules, which any one, who has authority over others, different from civil authority, prescribes to those whom he has a right to command. Such are the rules, which the master of a family prescribes to his children, or to his servants. The obligation of this sort of laws does not extend so far as the obligation of civil laws; for the former extends only to the family, of which the father or the master is the head; the latter generally extends to all the members of the civil community. Or if in any instances the obligation of the civil law seems to be confined within narrower limits; yet even in these instances we may plainly distinguish it from the law, that we are now speaking of; if we only attend to the authority from whence the law is derived. Thus military law, though it is confined to the army, is to be reckoned a part of the civil law, because it is derived from the civil power. The particular laws of any body corporate, which is but a part of the civil community, differs from the civil law only as a part differs from the whole; because the power, which such a body corporate has to make laws for itself, is granted to it by the civil government.

Law of
nations.

XIII. The law of nations is a law of greater extent than the civil law, and is not derived from the civil power. By the law of nations we mean such rules, as nations or civil societies are obliged to observe in their intercourse with one another. There are several points relating both to civil laws and to the law of nations, which want to be explained. But our business in this chapter was only to give the reader a general notion of

^h Grotius *ibid.*

laws, to shew him the several sorts, into which laws may be divided; and to bring him acquainted with the general matter of the law of nature. Such points, as relate to civil laws or to the law of nations, shall be explained in their proper place.

CHAPTER II.

Of Rights and Obligation.

- I. *The word Right sometimes signifies a law.* II. *The same word sometimes means a quality in actions.* III. *It commonly means a quality in persons.* IV. *Rights perfect and imperfect.* V. *Obligation and right are correlatives.* VI. *Two maxims of natural law explained.* VII. *What actions are void.* VIII. *Rights are natural or adventitious.* IX. *Rights are alienable or unalienable.* X. *Things are corporeal or incorporeal.*

I. **T**HE word *Right* is used in three different senses. Sometimes it signifies a law. Indeed, in our own language, the word has very seldom this meaning; perhaps it is used in this sense, when we say, that natural right requires us to keep our promise, or that it commands restitution, or that it forbids murder. But the latin word *jus*, which is supposed to answer to our English word *right*, is very commonly made use of in that language in the same sense as the word *lex*, to signify a law.

The word *Right* sometimes signifies a *Law*.

i Groc. *ibid.* § IX.

The word
Right some-
times means
a quality in
actions.

II. ^k The word right sometimes means that quality in our actions, by which they are denominated just or right ones. Though I think this quality is more usually called the rectitude, than the right of our actions. The definition, which I have here been giving of right when it is used for the quality of an action, is the same that Grotius has given. And we may observe upon it, that our author, when he thus defines it, does not inform us what this quality is. But if we call it *rectitude* instead of calling it *right*, we shall soon be able to inform ourselves what it is, and wherein it consists. The rectitude of an action can be nothing else but its conformity or consistency with some rule: particularly, in morality, it is the conformity or consistency of our actions with such laws as we are bound to observe. It is from this conformity or consistency of our actions with the law, that they are denominated lawful, or just, or right. In explaining what is meant by the right or rectitude of actions, I have made use of the two words *conformity* and *consistency*; because if I had used only the former word, the reader might have been led to imagine, that no actions are just or right ones, but such only, as the law commands. Whereas in truth, not only such actions, as are conformable to what the law commands, but such likewise, as are consistent with it, or are not forbidden by it, have all the rectitude, that is necessary to make them just, or right ones: for whatever actions are lawful, are just or right; and it is plain, that all actions are lawful, which law does not forbid.

All our actions, in reference to the laws, are divided into such as are duties, such as are crimes, and

^k Grot. *lib.* § III.

such as are indifferent: those actions which the law forbids, are crimes; those which it commands, are duties; and those are indifferent, about which it is silent, so as neither to forbid nor command them. This latter sort of actions the law allows of; and such allowance is sufficient to make them lawful. And as every action is called lawful, if it is not unlawful; so every action is called just or right, if it is not unjust or wrong.

It is no unusual mistake to imagine, that such actions only are to be esteemed just as the law commands. And if what has been said already is not sufficient to guard against this mistake, and to shew the difference between the notions of duty and rectitude, or between such actions, as we are obliged to do, because the law commands them, and such as are simply just, because the law does not forbid them; we may observe further, that the word *Justice* itself, though it seems to mean a positive quality in actions, frequently means a negative one; or that actions are denominated just rather from what is not in them, than from what is. Such actions are unjust as have the quality of doing harm, or preventing good: and such actions are just as have not this quality. When therefore we say, that the law of nature commands us to be just; the meaning is, that it forbids us to do harm, or to prevent good. And consequently our actions are as just, as this part of the law of nature requires, provided we are careful to avoid what the law forbids. So that in this view our actions are just, not only when they are such as the law commands; but when they are such, as the law is silent about or does not forbid.

The word
Right com-
monly
means a
quality in
persons.

III. ¹ By *Right* we commonly mean that quality in a person, which makes it just or right for him either to possess certain things, or to do certain actions. In this sense we use it, when we say, that a man has a right to his estate, or a right to defend himself. By saying, that *he has a right*, it plainly appears, that we conceive this right to be some quality, which belongs to him, or is inherent in his person. Now in this definition Grotius, instead of describing the quality itself, has only described the effect of it; instead of informing us what it is, and wherein it consists: he only tells us what it does, that it makes a man's actions or his possession just. However, we may easily discover what this quality is, if we will only ask ourselves, what it is, which makes our actions and our possessions just? The obvious answer to this question is, that our actions or our possessions are just, where they are consistent with law: and consequently the right, which any person has to do any action, or to possess any thing, is nothing more than his power of doing this action, or possessing this thing consistently with law.

Right and moral power are expressions of like import. A man's natural power extends to every thing, which his strength enables him to perform, whether the law allows of it or not. But his moral power extends to such things only, as his strength enables him to perform consistently with law. For in a moral sense, or in reference to such rules, as a man is strictly obliged to observe in his behaviour, he is not supposed to have any more power than what the law allows him to exercise.

¹ Grotius, *ibid.* §. IV.

IV. ^m Rights are divided into two sorts, perfect and imperfect. He would be but an indifferent casuist, who, in explaining the distinction between these two sorts of rights, should only tell us, that perfect rights are those, which may be asserted with rigor, even by employing force to attain the execution, or to secure the exercise of them, in opposition to all such as should attempt to resist or disturb us: but, when reason does not allow us to use forcible methods, in order to secure the enjoyment of the rights, which she grants us, then these rights are imperfect ones. If a man had any doubt concerning some particular right, whether it was perfect or imperfect; and was upon making enquiry of his casuist, to receive only this description of the two sorts of right; instead of being resolved as to his present doubt, he would only be led to another; he would be sure upon receiving this answer to doubt, whether the right was such an one, as might be supported with rigor, and by the use of force, or not; and his casuist would never be able to give him any reasonable satisfaction in this point, till he has given a farther and clearer explanation of the distinction between the two sorts of right, than this before us.

Rights perfect and imperfect.

We may perhaps see the distinction between perfect and imperfect rights more clearly; if we observe, that where the things, which we have a right to possess, or the actions which we have a right to do, are or may be fixed and determinate, the right is a perfect one: but where the things or the actions are vague and indeterminate, the right is an imperfect one. If a man demands his property, which is withheld from him, the right, that supports his demand, is a perfect one; be-

^m Grotius, *ibid.*

cause the thing demanded is, or may be, fixed and determinate. But if a poor man asks relief of those from whom he has reason to expect it; the right, which supports his petition, is an imperfect one; because the relief, which he expects, is a vague and indeterminate thing. As far as the bargain between a master and his servant has determined the service, which the latter owes, and of course the command, which the former has a right to give, the master's right to command is a perfect one. But though a parent has a right to expect esteem and reverence from a son, that is of full age; yet as the measures of esteem and reverence, which the son then owes to the parent, are not fixed and determinate, the right of the parent is, in this instance, an imperfect one.

If this account of the matter does not appear satisfactory, we may consider it in another light. Where no law restrains a man from carrying his right into execution, the right is of the perfect sort. But where the law does in any respect restrain him from carrying it into execution, it is of the imperfect sort. Or, in other words, our right is a perfect one, where we can carry it into execution, without breaking in upon the right of other men; but it is an imperfect one, if the rights of other men stand in the way of it; so that we cannot carry it into execution without breaking in upon them. Thus I have a perfect right to defend my life against those, who have no right to take it away. I have a perfect right to make use of such means as are necessary for my defence; where the law does not prescribe the means to be made use of. I have a perfect right to keep my property; since my possession of what is my own does not violate the rights of any other man. When my property is withheld, my right to recover it

is a perfect one; because no law restrains me, or no person has any right to hinder me from recovering it. My poverty may give me a right to expect relief from them, that I have deserved well of; but I cannot carry this right into execution without breaking in upon the right, which they have to their own property; the law therefore restrains me from carrying it into execution, and the right is an imperfect one. If I am well qualified for any office of trust and profit in a civil society, especially if I am better qualified for such office, than my competitors, I have a right to expect it: but this right is only an imperfect one; because the office being in the disposal of the governors of the society, I cannot carry my right into execution without breaking in upon their right to dispose of it, as they please; and the same law, which gives them the disposal of it, hinders me from carrying my right into execution.

V. Obligation and right are correlative terms: where any person has a right, some one or more persons are under an obligation, which corresponds to that right: and on the contrary, where any person is under an obligation, some other person or persons have a right, which corresponds to that obligation. If the right is a perfect one, so is the correspondent obligation: if the right is an imperfect one, the obligation is so too.

Obligation
and Right
are correla-
tives.

This might serve for the explaining the distinction of obligations into perfect and imperfect. As a man's right to his life is a perfect one: we may be sure, if we know this, that the obligation not to take it from him is a perfect obligation. As the proprietor has a perfect right to demand his goods of us, when we happen to be in possession of them, we are under a perfect obligation not to withhold them. We are obliged to

relieve the indigent ; but our obligation is of the imperfect fort, because they have only an imperfect right to expect relief. When we have the disposal of places of trust or profit, we are obliged to give them to the most deserving : but this obligation, in respect of those, who are most deserving, is an imperfect one ; because their right to the places, which they ask for, is of the imperfect fort.

But perhaps we may be able to distinguish between perfect and imperfect obligations, without attending immediately to the rights, which answer to them, by observing ; that the obligations, which arise out of negative precepts of the law are perfect ; and that those which arise out of affirmative precepts, are imperfect. For since the matter of negative precepts is precise and determinate, such precepts allow of no liberty at all ; they take away the whole moral power of acting, and consequently produce a perfect obligation. But the matter of affirmative precepts is not so precise and determinate ; such precepts are to be complied with as we have proper opportunities ; and our judgment is to direct us as to the opportunities : whilst therefore they direct us how to behave, they allow some liberty of chusing ; and upon that account the obligation produced by them can only be imperfect. The law says—Thou shalt do *no* murder—The obligation here is of the perfect fort ; for the matter of the law is so precise and determinate, as to leave no moral power of acting. The laws says—Honour thy father and thy mother—The obligation here is imperfect ; because as the matter of the law is not precise and determinate, instead of leaving no power of acting, it supposes us to have such a power, and directs us how to make use of it, as we have opportunity.

From what has been said already concerning the nature of justice, that it consists in doing *no* harm to others, it appears that the precepts of justice are all of them negative ones; and consequently, that all of the obligations of justice are of the perfect sort. But as kindness and favour consist in doing good; the precepts of benevolence are affirmative, and upon that account the obligations to any of those duties, by which any kindness or favour is done, are imperfect ones.

VI. There are two maxims of natural law, which are often applied very injudiciously, and which want therefore to be explained. One of these maxims is,—Two maxims of natural law explained. That no right can be founded on an injury. The other is,—That what could not be done lawfully, is valid, after it is done. To understand the meaning of these two general rules, and the proper application of them it will be necessary to observe, that some actions, which are contrary to law, are not only wrong, but void; that is, the law considers them, as if they never had been done, as to any moral effect, that might have been produced by them: but some actions, which are contrary to law, are only simply wrong; they ought not to have been done; but after they are over, they produce the same moral effect, as if they had been right. Where the obligation of the law is perfect; such acts, as are contrary to it, are void; or no moral effect is produced by them. The law says,—Thou shalt not steal. The obligation is of the perfect sort; and upon that account the act of theft, as to any effect, which the possession of goods might have produced, is void; the thief gains no property in the goods, which he has stolen. The reason of this is plain: in

the use of our natural power we can break the law : but since the obligation, as it is a perfect one, has taken away the moral power of acting, the law does not suppose us to have any power left, and consequently does not suppose any thing to have been done with any effect, where we have made use of such natural power. Now an injury, properly so called, is a breach of justice, that is, it is a breach of a perfect obligation; and the production of a right is a moral effect. But since no breach of a perfect obligation can produce any moral effect, it follows, that no right can be produced by an injury. Where the obligation of the law is imperfect, such acts, as are done contrary to it, are simply wrong, and are commonly not void, but produce their proper effects, as if they had been right. The law says—Obey your parents. A son of full age contracts himself ~~in~~ marriage, contrary to the commands of his parent: such a contract, though it is unlawful, is valid. The reason is, because imperfect obligations do not take away a mans power of acting, but only direct him in the use of it. And when the law supposes a power of acting, it cannot suppose nothing to have been done, where such power has been made use of. The act therefore is commonly not void, but will obtain its proper effect. Thus we see, that these two general rules, though at first sight they may appear inconsistent with one another, are both of them true, when they are properly applied. The former rule,—That no right can be founded on an injury,—is to be applied to cases of perfect obligation. The latter—That what was unlawful to be done, is valid, after it has been done—is applicable only to those cases where the obligation is imperfect.

VII. ⁿ We have already seen, that such actions as ^{What actions are void} are contrary to any precepts of natural law, where the precept is of perfect obligation, are void; but that such as are contrary to precepts of imperfect obligation, though they are wrong, are however commonly valid. I say, *commonly* valid, because in some cases, even such actions as these are void. The way to know, whether actions, that are contrary to a law of imperfect obligation, are void or not, is to consider the effect of them. If the effect is consistent with the law, then the act is valid; because as the obligation was imperfect, there was a moral power in the agent; the act therefore does not want a valid foundation: and because the effect is consistent with the law, by the supposition, the law will not hinder its effect. But if the effect is illegal, as well as the act, then notwithstanding there seems to be no defect of moral power on the part of the agent, yet the act will be so far void as not to produce any effect: because the effects cannot proceed or take place, where the law disallows them. The law says—Honour thy father and thy mother. The obligation is imperfect. But yet, in virtue of this precept, the marriage of a son with his mother will be void; because the effect of such a contract is as inconsistent with the law as the act is. The superiority, which such a marriage would give to the son over his mother, is inconsistent with the honour, which the law requires him to pay to her. This may be expressed otherwise. What is done contrary to a precept of imperfect obligation will be void; if the validity of the act would discharge us from the obligation of such precept for the future. Thus, the law says, as above,—Honour

ⁿ Grotius Lib. II. Cap. V. § X.

thy father and thy mother.—A man vows, that whatever he gives to his father or his mother out of his substance, shall immediately be consecrated to God, so as to make it unlawful for them to use it, or to receive benefit from it. Such a vow as this is a void one, notwithstanding the precept, with which it is inconsistent, is only of imperfect obligation. The general reason is, because the validity of it would make void a precept of the law of nature. And consequently, as no man can have a moral power of releasing himself from that law, no man can have a moral power of doing any act, which will make that law void, or which, if it was to obtain its effect, would for the future release him from the obligation of observing that law. So that in reality even in these instances, as in those, where we transgress a precept of perfect obligation, the act is void from a defect of moral power in the agent.

Rights are
natural or
adventitious.

VIII. Another division of our rights is into natural and adventitious. Those are called natural rights, which belong to a man by the gift of nature, those, which belong to him originally, without the intervention of any human act. Adventitious rights are such, as presuppose some act of man, from which they arise, and upon which they originally depend. The rights, which a man has to his life, to his liberty, to his health, to freedom from pain, to the integrity of his body, to his good name, &c. are natural ones. Property, or the right, which he has to his goods either moveable or immoveable, sovereignty or the right which he has to command others of his own species, and many more of the like sort, which arise from some previous bargain or contract, either express or tacit, are adventitious ones. But though some of our rights are thus

called adventitious, and are by this means distinguished from natural rights; we must not imagine, that only the natural rights of mankind are under the protection of the law of nature; or that it is no offence against the law of nature to violate such adventitious rights. This law equally forbids the violation of our rights of either sort: such things, as we acquire consistently with the law of nature, are as much our own, as if nature had given us them originally: as much causeless harm, that is, as much injustice, is done to a man, by causelessly taking from him what he has fairly acquired a right to, as by causelessly taking from him what he had a right to by nature. And since the law of nature equally forbids every instance of injustice, it forbids, not only the violation of men's natural rights, but of their adventitious ones too.

IX. Some of our rights are alienable, others are unalienable. Those rights are alienable, which the law does not forbid us to part with. Those only are unalienable, which we cannot part with consistently with the law. There seems to be no other foundation for such a distinction of our rights, but this. I know not how any one can shew, that any of our rights, either natural or adventitious, are unalienable, unless he can produce some law, which forbids our parting with such right. Certainly where a man's right to possess a thing, or to do an action, is absolute, or is not restrained or limited at all by the law; he may part with it, if he pleases, either by giving it up entirely; or by transferring it to some other person. An absolute right is otherwise unintelligible: since the power of doing, as we please, makes up the whole notion of such a right. This therefore may be laid down as

Rights are
alienable or
unalienable

a general and fixed rule, that none of our rights are unalienable, but such as are in some respects restrained and limited by law.

Things are
either cor-
poreal or
incorporeal

X. Before we go on to consider the several rights of mankind, and the manner of acquiring them; it may be of use to us to observe, that things, in the science of natural law, are divided into corporeal and incorporeal. Our senses will best inform us what things are corporeal; for such things are called corporeal, as are the objects of our senses. Of this sort are a man's cattle, his house, his furniture, his lands, his implements of husbandry, his money, &c. Incorporeal things are such, as cannot be seen or handled; they consist of rights, and no real thing exists without us conformable to that idea of them, which is in the mind: only for better dispatch, we frequently speak of our rights, as if they were real things. Thus sovereignty is spoken of, as if it was a real thing; though there is no corporeal existence, which answers to our idea of it: it consists wholly of a right to do certain actions, or to give and enforce certain commands. An advowson, which is a right of presentation or collation to a church, is an incorporeal thing. An ecclesiastical benefice is itself an incorporeal thing; there is no real thing existing, which answers to the whole notion of it; it consists not only in a right to receive certain profits, but in a right likewise to do certain actions.

Our rights being divided, ° as above, into rights to possess certain things, and rights to do certain actions, we will go on to consider them under these two general heads.

° See § III.

CHAPTER III.

Of Property.

I. *Property what.* II. *Things not appropriated originally.* III. *In the community of goods, a right to use supplies the place of property.* IV. *Inconveniences arising from a community of goods.* V. *Property remedies these inconveniences.* VI. *A conjecture about the first author of property.* VII. *Property arose from compact.* VIII. *This compact is either division or occupancy.* IX. *Property now only to be acquired by occupancy.* X. *Mr. Lock's opinion examined.* XI. *Making a thing introduces no property but by occupancy.* XII. *Acquisitions are either original or derivative.* XIII. *Property either general or particular.* XIV. *How far Property ceases by dereliction or extinction of the Proprietors.*

I. **O**UR ^pright to things is either such an one as ^{Property} is common to us with all mankind, or such ^{what.} an one as is peculiar to ourselves. Some things belong to us, because they belong to the species in general, and to us among the rest. Other things belong to us by such a right, as excludes all the rest of the species from having any thing at all to do with them. Such an exclusive right to things is called property. Where things are thus fully our own, or where all others are excluded from meddling with them, or from interfering in any manner about them; it is plain that no person, besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing

^p Grot, Lib. II. Cap. II. § I.

of them, as he pleases. So that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them.

Things not
appropriated
originally.

II. It does not appear, that the ^a Author of nature, when he provided for mankind such things, as are necessary for the support or comfort of life, appropriated particular things to particular persons, or gave to any one a right to any part of this provision exclusive of the rest of the species. The world, which we inhabit, the trees, herbs, and fruit, which the earth produces, the soil itself from whence they are produced, the inferior animals, such as birds, beasts, and fishes, which supply us with food, or labour for us, or cloath us, or serve for our pleasure, were given to all alike. As the Author and Giver of these things stands in the same relation to all mankind; his gifts, as far as reason can judge, must belong to all: nor can we conceive any of them to belong originally to any part of the species or to any individual exclusive of the rest; unless we could find, that he had made some express division and assignment of them. Now as reason can never collect such an express or positive division and assignment, so neither does revelation teach us that any such was made, either from the beginning of the world, or in any subsequent period of it, by the Lord of all things. We therefore conclude, that all things be-

^a Grotius *ibid.* § II.

longed originally to all mankind in common, and that the exclusive right of property was introduced by some act of man.

III. If things had continued in this state of community, they would have been used and enjoyed by us, only as we had occasion for them: each person might have taken out of the joint stock as much as he wanted, and no more, and might have applied to his own purposes what he had so taken, as long as he wanted it, and no longer. For these common goods are his in no other respect, and for no other purposes, but to supply his wants; and they belong to the rest of mankind in the same respect, and for the same purposes, as much as they belong to him. These purposes therefore limit his claim to them; since all his claim is only to use what he has occasion for. And consequently he can have no right to take more than is necessary; or to keep what he has so taken longer than is necessary. Whilst things continued in this state of community, the general claim of all mankind to use what they wanted so far supplied the place of property, that each individual, though he could not accumulate possessions, had an opportunity of furnishing himself with the necessities of life, and even with the conveniences of it too; provided no person had any occasion for what he had taken beyond what was barely necessary.

From hence we may understand, that a man might possibly be injured in respect of these common goods, even though, by the supposition of their being common, he had no exclusive right of property in any of them, but only a claim in common with the rest of mankind to use what he wanted. If they belong to him, as they belong to the rest of mankind; they, who hinder

In a community of goods, a right to use supplies the place of property.

him from using what he wants, when they do not want it themselves, do him a causeless harm ; he has a right in common with them to use what he wants, and they take his right from him.

Inconveni-
ences aris-
ing from a
community
of goods.

IV. Such a community of goods as we have been speaking of, would necessarily become inconvenient, as the wants of mankind increased, and as the love of justice and equity decayed amongst them. The wants of mankind were increased by polishing their manners, and by introducing amongst them a civilized and elegant way of living. Savages, who could be contented to live in caves, to cloath themselves with bark or skins, and to feed upon nuts or acorns, or such other fruits as the earth produces without much culture, would have but few wants, and these wants would be easily supplied. But when men are civilized and improved in their way of living, they must have convenient houses, useful furniture, warm and clean clothing, and their food must be prepared and dressed for them before they can eat it. This increase of wants arising from a civilized and improved way of living would not be perceived, if nature furnished us with as plentiful a supply for these wants, as for the ordinary wants of a savage ; but materials to supply such wants as these, are not to be met with every where ; nature has given us some of them so sparingly, that it requires much industry to collect them ; and even those which are collected most readily, are not fit for use till they are improved and manufactured with much art and labour ; so that even in these instances, where materials are plentiful, provisions would be scarce, if there were not able heads to contrive, and a number of hands to work.

But the increase of numbers will be an additional increase of the wants of mankind. Whatever way of life they may be in, the greater their numbers are, the greater plenty of provisions they will have occasion for. The same quantity of materials, or the same improvements, which would produce plenty, if there were but few men to consume what is provided, would be too scanty to supply the demands of a multitude. When the wants of mankind, compared with the provisions for supplying them, were thus increased; it would become not only inconvenient, but inconsistent too with their peace and quiet, to continue joint partners of all things, as of a common stock belonging equally to all. For when the wants of them all, in such a scarcity of provisions, could not be supplied at once; when more men came at the same time to have occasion for the same thing, which could not however answer the purposes of more than one of them; in such a state of community, where each has the same claim to what all of them want, and but one of them can enjoy, disputes and quarrels would be endless.

This inconvenience would become more pressing, if mankind failed in the practice of equity and benevolence towards one another. Few would be willing to labour for the improvement of a common stock, where others are to enjoy in common with themselves the produce of their contrivance and industry; and few, even of them, who were least able or least inclined to work, would be willing to take up with the rude and uncultivated supplies of nature, or be contented to use and enjoy nothing, but what they had cultivated and improved themselves. Thus, on the one hand, the want of such benevolence, as might incline us to labour for the good of the species, and on the other

hand, the want of such equity, as might dispose us to be satisfied with the fruits of our own industry, would increase those disputes and quarrels which a scarcity of provisions had begun.

Property
remedies
thoseincon-
veniences.

V. The most effectual way of securing the peace of mankind, in these circumstances, is by introducing an exclusive property. As by this means, the extent of each person's claim is ascertained, and the particular share out of the general stock which belongs to him, is settled; he can have no just grounds of quarrelling with others, for taking more than they ought to have, whilst they let his property alone: and they on the other hand, can have no pretence to hinder him from using and enjoying what he has a right to use and enjoy, exclusive of them. If his share is large enough to supply him with the conveniences and elegancies of life; those who are more scantily supplied, have no just reason to complain that they are injured; and if the share, which is allotted to him out of the general stock, will afford him no more than the necessaries of life, he must content himself, as well as he can, with this small provision, because he knows that he can claim no more. —This, then, is one advantage of an exclusive right above a community of goods, that though it may sometimes be a question amongst several claimants, which of them has the right; yet, these questions will seldom arise, and even when they do arise, they will admit of a decision. No two persons can have full property in the same thing, because the property of one effectually excludes the claim of the other. Whereas in a state of community, where all have an equal right to the same thing, it would be a continual question, which claimant should use or enjoy the matter in dispute; nor could such a question be easily decided, because neither

of the claimants could set forth such a right as would effectually over-rule the pretensions of his competitor. But there is, besides this, another considerable advantage arising from the introduction of property: Such an exclusive right assigns to each person the part, or materials in which he is to labour, and makes the improvements produced by his art and industry, entirely his own. Men will be more ready to make improvements when they are morally sure of enjoying them; than they would be, if others, who are unwilling to work had any claim upon the fruits of their labour. These seem to be the reasons, which determined mankind to change their right to things from a common claim, which belonged to all alike, into an exclusive claim of particular property.

VI. If we look into the history of the first ages of the world, as it is recorded by Moses, in the book of Genesis, we may there perhaps meet with some account of the first inventor of property. A conjecture about the first author of property. Supposing the reasons for introducing this change to have been rightly assigned, we should look for the origin of property amongst them, whose wants were the greatest, who were most scantily provided for, and who were least likely to practise the duties of benevolence and equity towards one another. All these circumstances concur in the posterity of Cain. Their ancestor had killed his brother; and his fears, lest the rest of mankind should punish this crime upon him and his posterity, induced him and his family to unite themselves together, and to build a city for their defence. By living in society, their manners were polished; and a refined way of living was introduced amongst them. This seems to

† Genes. IV. 8, 17, 21, 22.

be evident ; because we find, that they were the inventors of arts and sciences, both of such as are useful, and of such as administer to pleasure. Tubal-cain was the instructor of every artificer in brass and iron ; and Jabal was the father of all such as handle the harp and organ. This family had separated themselves from the rest of mankind, and were shut up together within a narrow district : where, if there had been but a few of them, and they had been contented with coarse fare and ordinary cloathing, they would have found it difficult enough to supply themselves. But the difficulty was rendered greater not only by their elegance and luxury, but by the constant encrease of their numbers. We have no reason to imagine, that this family had any great sense of duty : it is much more likely, that, as they lived with a bad parent, the influence of his example had indisposed them to observe the rules of equity and benevolence in their behaviour towards one another. Here therefore we are to look for the beginning of property, or of an exclusive right to things. And the sacred historian informs us accordingly, that ^s Jabal was the father or inventor of possession. Our translators render it, *of such as have cattle*. But Jabal could not be the first, who taught how to bring up, and take care of cattle : because we read that Abel had before this time been engaged in this employment. The original word signifies *possessions* of any sort, acquired in any manner, and is not necessarily confined, as our translators confine it here, to possessions of cattle. If therefore we render this passage, as it ought to be rendered, that Jabal was the inventor of possessions ; there will be some appearance of reason for concluding

^s Gen. IV. 20.

that he was the first projector of particular property.

¹ Abel is indeed said to be a keeper of sheep, and Cain to be a tiller of the ground: but it is not necessary, that each of these should have had property in his respective department; since they might, either by their own choice, or by their father's appointment, undertake to cultivate these two different parts of the common stock.

VII. But let us return from this digression. ^u We have seen by what reasons mankind were led to introduce such an exclusive right as we call property, and are to enquire, in the next place, in what manner it could be introduced consistently with justice. The common claim, which all men originally had to all things, is taken away by the introduction of property, as far as this exclusive right extends. Where one man has a right to exclude all others from the use or enjoyment of a thing; they cannot possibly have any claim of common right to use and enjoy it. Now it would be inconsistent with justice to deprive them of their common right without their consent. Property therefore could not be introduced, consistently with justice, unless mankind consented to it either expressly, or tacitly. But if they lawfully might, and actually did, give such consent; that is, if their common right was alienable, and they agreed to alienate it; no injury was done to them by the introduction of property. There is no reason to say, that this common right is unalienable: there is indeed no law of nature, which commands the introduction of property; but neither is there any, that restrains

Property
arose from
compact.

^t Gen. IV. 2.

^u Grot. Iib. II. Cap. II. § II.

men from giving up their common claim for the benefit of any one, who has a mind to appropriate to himself what would belong to all in common, unless they had parted with their claim.

This compact is either division or occupancy.

VIII. When mankind were few in number, and lived together in the same place, they could easily meet in order to divide their common stock, and to assign to each other his proper share by express consent, agreement, or compact. But after their numbers were encreased, and they were settled in different parts of the world very distant from one another, it became impossible for all of them to meet together. This method therefore of introducing property by express consent was rendered impracticable. Some consent however has been shewn to be necessary, to make the introduction of property consistent with justice: and a tacit one would be sufficient for that purpose. Such a tacit consent is called occupancy. Indeed occupancy is but one part of the act, which is called by this name; but as it is the leading part, it has given its name to the whole act. What a man seizes upon, with a design to make it his own, or to appropriate it to himself, will become fairly his own, or will be made his property; when the rest of mankind, as far as they have an opportunity of observing him, understand what his design is, and shew by their behaviour, in not molesting him, that they agree to let his design take effect. If they know his intention, and do not interrupt or contradict it, when they have it in their power, they tacitly consent to it.

A man's bare intention, of acquiring property in a thing, is not enough to make it his own; till that intention is known: for without the consent of man-

kind no property can be gained justly; and there can be no ground for presuming, that they consent to what they know nothing of. Now the act of occupancy is the outward mark, by which his intention is made public. And this act is therefore understood to give him property; because if the rest of mankind, that is, if the joint partners, who had before a right in common with him to the thing, which he has seized, do not upon this notice of his intention assert that common right, they are presumed to part with it. However, before a right of property can proceed upon the act of occupancy, one circumstance is necessary, which is, that the thing seized upon should be certain and determinate. No consent of mankind can be presumed to be given to what the occupant designs, any farther than that intention is or may be known to them. And if the thing seized upon is uncertain and indefinite, the act of occupancy leaves his intention doubtful and obscure; the rest of mankind do not understand what it is: and their consent cannot be supposed to reach any farther than their knowledge.

Upon the whole then, property, as we have seen already, cannot be introduced consistently with justice, unless by the common consent of mankind. The consent which is necessary for this purpose, might either be given expressly, when all mankind could meet together—and such an agreement is called division; or else it may be presumed, in consequence of the future proprietors having without molestation, taken and kept possession of the thing, which he intends to make his own; and such a tacit agreement is called occupancy.

Property
can now
only be ac-
quired by
occupancy.

IX. But though either division or occupancy might give property in the first ages of the world, when all the joint commoners could meet together; the way of introducing property by division is now at an end. The great numbers of mankind, and their remoteness from one another, have rendered it impossible for them all to meet, and to divide the common stock of goods, or such parts of the common stock, as have not yet been appropriated. There is therefore at present no other method left for beginning property but occupancy only; all things which were not appropriated formerly, must now be appropriated by occupancy, or not at all.

Mr. Lock's
opinion ex-
amined.

X. Mr. Lock agrees with Grotius, that occupancy, is the foundation of private property. But then he does not consider occupancy in the same light, that Grotius considers it, as a tacit agreement between the joint owners of the common stock and the future proprietor. In his opinion, things, which originally belonged to all mankind in common, became the property of the first occupant; because, as he has a property in his own person, and consequently in the labour of his body, or in the work of his hands, by removing any thing out of the state, in which nature placed it, he has mixed his own labour or a personal act of his own with it; and by thus joining to it something, which is his own, he makes it his property. For this labour being the unquestionable property of the labourer, no man, but he, can have a right to what that is once joined to; at least where there is enough, and as good left in common for others. Thus, whilst he agrees with Grotius in words, they differ widely from one another, when the sense of their words is explained.

I design to examine at large his application of what is here advanced. But before we do that, let us stop a while, and enquire, whether his first principles are true.—As every man has a property in his own person; the labour of his body and the work of his hands are properly his.—Now the labour of a man's body, or the work of his hands, may mean either the personal act of working, or the effect which is produced by that act. In the first sense it must be allowed, that a man's labour is properly his own; he has a right to exert his strength in what manner he pleases, where he is under no restraint of law. But it does not follow from hence, that the effect of his labouring, or that the work of his hands, in the other sense of these words, must likewise be properly his own. He has, you may say, mixed his own labour with what he removes out of that state, in which nature had left it; but will you conclude, that by thus joining to it his act of working, he has made it his own? In order to strengthen such a conclusion it would be necessary to shew, that the labour of one man can over-rule or set aside the right of others. If I knowingly employ myself, in working upon the materials of my neighbour; however I may have mixed a personal act, which is my own, with his property; this will never give me a reasonable claim to his materials. You may urge, that the cases are not parallel; because the materials, now in question, are not the property of any one; and consequently, that, by working in such materials, we may gain property in them; though we could not gain it, by the like act, where the materials were appropriated before. But the cases are parallel, as far as the point before us requires. It is allowed, that the materials do not belong to any person by an exclusive

right of property; but then they belong to all mankind of common right. And if mixing my labour with the materials of an individual will not make these materials mine, in opposition to his exclusive right, I know not how any act of the same kind, or the mixing my labour with materials, which belong to all mankind, should make them mine, in opposition to their common right. As setting aside the right of an individual, without his consent, is an injury to him; so setting aside the common claim of mankind, without their consent, is an injury to them: and if an injury cannot be the foundation of a right in one case; it will not be very easy to prove, that a like injury may be the foundation of a right in the other case.

Mr. Lock has applied these principles to explain the introduction of property both in moveable and immoveable goods. And if we go on to examine what he says upon the subject, we shall find, that he has mistaken the exercise of a common right for the exclusive right of property. “^w He that is nourished, says this writer, by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself, no body can deny but the nourishment is his. I ask then, When did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? And ’tis plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them, more than nature, the common mother of all, had done; and so they became his private right. And will any one say, he had no right to those acorns or apples, he thus ap-

^w Lock's works, Vol. II. pag. 181.

appropriated, because he had not the consent of all mankind to make them his? Was it robbery, thus to assume to himself what belonged to all in common? The answer here is obvious. When those acorns or apples are become a part of his body, we may, if we please, say, that they are his: but the right, which he then has in them, is the same, which he has in his whole person; and is no more to be called a right of property, in the sense that we use this word, when we apply it either to moveable or immoveable goods, than the right, which a man has in his leg or his arm, can be called by this name. When he gathered them, or when he boiled them, he had likewise a right in them; but it was just such a right as any one else might have had: a right, as one of the joint companions, to use as much out of the general stock, as he had occasion for. It is by no means necessary either to allow on the one hand, that he had an exclusive right of property in them, or on the other hand to contend, that it was robbery, thus to assume to himself what belonged to all in common. There is a middle opinion between these two, which is the opinion already mentioned; that when he gathered them, and was eating them, he exercised his common right of using and enjoying, out of the joint stock, what his occasions called for. Though therefore we contend, that he could not acquire an exclusive right of property in them, or in any thing else, without the consent of mankind, either express or tacit; yet there is no fear of his being starved, whilst he is waiting for this consent; because in the mean time the exercise of his common right will sufficiently provide for his subsistence.

That it is this common right which a man exercises, when he separates a thing for his own use, and claims

to use it, because he has so separated it, will appear from the limitation, which Mr. Lock himself puts upon what he calls property, when it is thus acquired. “^x God has given us all things richly, is the voice of reason, confirmed by inspiration. But how far has he given it us? To enjoy. As much as any one can make use of, to any advantage of life, before it spoils, so much he may, by his labour, fix a property in: whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy.” But certainly, to take no more than we want, or no more than we can make use of, before it will be spoiled, is a limitation unknown to property: it belongs only to the exercise of a common right in a joint stock; where no one of the commoners has an exclusive right to keep, but all and each of them have a joint right to use.

But Mr. Lock endeavours to take off this limitation, and to shew us by what means, upon the same principles, property might be accumulated. “^y The greatest part of things really useful to the life of man, and such as the necessity of subsisting made the first commoners of the world look after, as it doth the Americans now, are generally things of short duration; such, as if they are not consumed by use, will decay and perish of themselves: gold, silver, and diamonds, are things, that fancy or agreement hath put the value on, more than real use, and the necessary support of life. Now of those good things, which nature hath provided in common, every one had a right to as much as he could use, and property in all he could effect with his labour; all, that his

^x Lock ut sup. ^y Lock ut sup. p. 186.

industry could extend to, to alter from the state nature had put it in, was his. He that gathered a hundred bushels of acorns, or apples, had thereby a property in them, they were his goods, as soon as gathered. He was only to look, that he used them before they spoiled, else he took more than his share, and robbed others. And indeed it was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to any body else, so that it perished not uselessly in his possession, then he made use of it. And if he also bartered away plumbs, that would have rotted in a week, for nuts, that would last good for his eating a whole year, he did no injury; he wasted not the common stock; he destroyed no part of the portion of goods, that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells or wool, for a sparkling pebble or a diamond, and keep them by him all his life, he invaded not the rights of others; he might heap up as much of these durable things, as he pleased; the exceeding the bounds of his just property not lying in the largeness of his possessions, but the perishing of any thing uselessly in it." But this writer seems here to take for granted the point in question. We contend, and he allows, that the right of him, who gathered acorns or plumbs, extends no farther than to such a quantity of them, as he can use before they are spoiled: and in shewing how this limitation may be removed, he reasons as if there was no such limitation. How else should he, who had collected more plumbs, than he could use before they were spoiled, or more sheep than he wanted to clothe or to feed himself, barter away the plumbs for nuts, which

would keep the year round, or for metal, that would keep as long as he lived? The very notion of bartering implies property. Our author therefore must suppose the man to have property in what would spoil before he can use it; or else he could not suppose him to barter it away: that is since this contrivance of bartering was introduced, to shew how property might be accumulated, or to take off the limitation of appropriating no more than can be used, whilst it is good; in order to apply this contrivance, he must suppose the limitation to be taken off already, and the man to have property in plumbs, or sheep, which he does not want, and which he could not use, before they would perish in his hands. Indeed if mankind would consent and submit thus to barter one with another; this consent would be sufficient to take off the limitation, and to introduce a true right of property. For if I knowingly and willingly bargain with another about my own goods, which are in his possession, as if they were his; this act of mine may well be construed as a tacit consent to make them his. And if in like manner mankind would bargain with one another about goods, which belonged to all in common, as if they were the property of the possessor, they tacitly give up their claim to those goods, and so they become his property. But property, when introduced after this manner, is introduced by consent of parties, and not by the labour, which the possessor, or occupant, has employed in separating the things, which he possesses, from the common stock.

In Mr. Lock's opinion, property immoveable goods, such as the earth or soil, is acquired in the same manner and is governed by the same measure, as property in

moveable goods. “^zAs much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common.” But what is this again, but the exercise of a common right, instead of such an exclusive right as property is. For not to insist here upon the limitation of having property only in so much land, as we can use; let us try the effects of this right, and see whether they are the same with the effects of property. Suppose then, that the man, after he has for some time tilled the land, and cultivated it, was either by age or sickness to become incapable of tilling and cultivating it any longer: if the mixing his labour with it was his whole title to it; when his labour ceases, his title to the land must cease with it; the land can be his no longer than he can cultivate it; and when he is disabled for labouring, he cannot sell or let it to any other person: that is, it was his to labour in, but not his to dispose of as he pleases: and consequently his right could only be a right to use, and not an exclusive right of property. This Mr. Lock might have been sensible of, if he had attended to his own reasoning. “^aHe, says this author, that in obedience to the command of God, to improve the earth to the benefit of life, tilled and sowed any part of it, thereby annexed to it something, that was his property, which another had no title to, nor could, without injury, take from him. Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left, and more than the yet unprovided for could use. If then his title to the

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^z Lock ut sup. page 182.

^a Lock ut sup. page 182.

land, which he occupies, rests upon this principle, that there was enough for others, besides what he had taken for his own use; it is plain that, unless there had been enough for others, his title would not have been a good one: and from hence it follows, that all his title is no more than a common right to use what he wants, and not an exclusive right of property: because the right of property does not at all depend upon the convenience of others.

To strengthen this opinion concerning the introduction of property, and to answer an objection, which has been hinted at already, Mr. Lock compares the value of labour with the value of land, in order to shew, that the property which a man has in his labour, when he has mixed that labour with the land, overbalances the value of the land, with which it is so mixed. “^b Nor is it, says he, so strange, as perhaps before consideration it may appear, that the property of labour should be able to balance the community of land. For it is labour indeed, that puts the difference of value on every thing; and let any one consider what the difference is between an acre of land planted with tobacco, or sugar, sown with wheat or barley; and an acre of the same land lying in common, without any husbandry upon it, and he will find, that the improvement of labour makes the far greater part of the value. I think, as he goes on, it will be but a very modest computation to say, that of the products of the earth, useful to the life of man, nine tenths are the effects of labour: nay if we will rightly estimate things, as they come to our use, and cast up the several expences about them, what in them is purely owing to nature and what to labour, we shall find, that in most of them ninety-nine parts in a

^b Lock ut sup. page 184.

hundred are wholly to be put on the account of labour." But we may ask in return, what the value of pure labour is, when considered merely as the personal act of the labourer? If neither the timber of his plough, nor the horses, that draw it, nor the meat, which they eat, nor the manure, which he lays upon his land, nor the grain, with which he sows it, are his own, what will you rate his labour at? Certainly you rate it much too high, if upon comparing it with the value of the land, you set it at ninety-nine parts in a hundred, or even at nine parts in ten. But you will suppose all these materials to be his own. I ask therefore how he gained property in them? You answer, by his labour, and explain this labour to be only the act of taking them or separating them from the common stock. Now this labour is of little or no value at all; and consequently you cannot say, in this instance, that the common right of mankind is overbalanced by the labour of the occupant. And if, in one instance, a labour, which is worth nothing, when compared with the thing acquired, will give the occupant property; then we can have no reason to imagine, that it is the high rate of labour, when compared with the value of land, which so overbalances the common right of mankind to the land, as to give the labourer an exclusive right to it. You have only dazzled our eyes with this high account of the value of labour; since you must, in order to give it so high a value, suppose property to have been introduced beforehand by a labour, which is of little or no value at all. We may go one step farther. The property of labour, you say, overbalances the community of land: because the value of it, when compared with the value of land, is worth ninety-nine parts in a hundred. Now if, by saying,

that the property of labour overbalances the community of land, you only mean, that labour is worth much more than uncultivated land, we might allow it. But if you mean, that, because the value of labour is so much greater than the value of land, the labour of one man will over-rule or set aside the common claim of all mankind, we must deny it. For suppose the labour of him, who cultivates the land, to be worth ninety-nine parts in a hundred of the whole value of the land, after it is cultivated; all that could be due to the labourer, upon this supposition, would be no more than the produce of his own labour: the ninety-nine parts, which belong to him, would not swallow up the hundredth part, which he had originally no exclusive right to. This hundredth part, that is, the land itself, must therefore still remain in common, as it was before; he might labour in it again, if he pleased, as one of the joint commoners; but he would have no property in it. Let us try this reasoning in another instance. The landlord, as we call him, or the owner of the soil, after property has been introduced, has an exclusive right to some certain quantity of land, suppose for instance, to an acre which bears twenty bushels of wheat: the tenant ploughs and sows this land; and besides the mere personal act of labour, he uses his own materials in cultivating the land. Now the labour of the occupier puts the chief value upon the land, and without this labour it would be worth little; for it is to this that we owe all its useful production. For whatever the straw, bran, bread, &c. of that acre of wheat is worth more than the product of an acre of as good land, which lies waste, is all the effects of labour. You see then how much the property of labour overbalances the property of land. But no one will

be led to conclude from hence, that, because, according to this reckoning, in the value of an acre of land ninety-nine parts in a hundred are owing to the labour of the occupier, the property, which he has in his own labour, will swallow up the property which the landlord has in the soil; and that the land, because he has cultivated it, will for the future become his own. But if the right of property in the soil, which in estimating the value of land, is but one part in a hundred, is not over-ruled or set aside by the overbalance in the value of labour; I can see no reason why the same overbalance should be supposed to set aside the common claims of mankind to land, which was never appropriated. Let the right be what it will, whether it is a right of property, or of common claim, if an overbalance in the value of the labour, which is joined to it, will not swallow up one of them, no good reason can be given, why it should swallow up the other.

XI. The most natural claim to a thing seems to arise from our having made it: for no one appears to have so peculiar a right in it, as he, who has been the immediate cause of its existence. This opinion, if it was true in the full extent of it, would overturn our general position that division and occupancy are the only ways of introducing property. But it is to be observed, that when we make a thing, we do not produce the materials; these existed before, and all, that we do, is to give a new shape or form to them. Now the materials, out of which a thing is made, are either our own property; or they are the property of some other person; or they are the property of no one, but are in common to all. If, before we made the thing, the materials were our own; it is plain, that by mak-

Making a thing produces no property but by occupancy.

ing the thing we do not introduce any new or original claim, but only continue our former claim. The materials were our own, before the thing was made; and nothing else is our own afterwards: they are still the same materials, but only in a different shape. If the materials were the property of some other person; the maker of the thing has naturally no claim to them; unless he makes amends to the owner of them, or unless the owner voluntarily gives them up. For it would be an injury to the owner of such materials to take away his property, without his consent. But if the materials were in common, before the thing was made; that is, if they were not the property of any one; then by making a thing out of them property is introduced: because, in this case, the maker is the first occupant. As far therefore as specification, or the making a thing, differs from occupancy, it does not produce property, and whenever it does produce property, it obtains this effect only because it implies occupancy.

Acquisitions are either original or derivative.

XII. When I say, that property can be no otherwise acquired, but by division or by occupancy, I must be understood to mean, that original acquisitions can be made in no other way. Our acquisitions of property are divided into original and derivative. Original acquisitions are such as introduce or begin property in things, which were before in common or had no owner. Derivative acquisitions are such, as convey the property of things from one man to another: the things which are said to be alienated by the old proprietor, are derivatively acquired by the new one.

^d We may observe by the way, that original acquisitions are made not only of such things, as never had

^d Grot. *ibid.* § XIX.

an owner, but of such things likewise, as have had an owner, and by the ceasing of his property are become common again. Derivative acquisitions are but continuations of the same property in a different person. When therefore the property in a thing has ceased, or been interrupted, the thing returns into the common stock : and whoever acquires it afterwards, begins or introduces a new property in it ; just as if it had never before been in property at all.

XIII. • Property is of two sorts, either general or particular. By general property is here meant the right, which a body of men have to a thing, exclusive of the rest of mankind : and by particular property is meant the same exclusive right in an individual. General property is acquired by a general occupancy; or by occupancy in the gross. A number of men, uniting themselves into a collective body, are seeking for a place to settle in, and finding a large tract of land uninhabited, they seize upon it, and settle there. By such an act of occupancy the whole country becomes the property of this body of men. Though no single person in the body has a right to exclude any other single person, in the same body, from the use of any spot within the whole tract of land so seized upon; yet all and each have an exclusive right to the whole, and to every part of it, in respect of all other individuals, who are not members of this body, and in respect likewise of all other collective bodies whatsoever.

After such a general property has been introduced in the whole tract of land, where this body of men has settled ; something farther is requisite to give the individuals, of which the body is composed, particular property in the several parts of this tract. 'This

e Grot. *ibid.* § IV.

particular property is introduced either by exprefs division and affignment, or elfe by particular occupancy ; that is, either the body by exprefs agreement divides the whole country into parcels, and affigns to each individual the parcel, which is to be, and which is thus made, his own ; or elfe the body allows the individuals to feize upon fuch fpoys or parcels of land, as they like beft, and gives them, or rather allows them to have, an exclusive right to thefe fpoys or parcels fo feized upon.

How far property ceafes by dereliction or by extinction of the proprietors. XIV. § Property in goods may ceafe two ways. It ceafes, when the owners relinquish their right without transferring it to any one : and it ceafes likewise, when the owners are extinct, that is, when no perfon is left, who has any right to the goods. Property in goods ceafes by the owners dereliction of them ; becaufe, as no one elfe had any exclusive right in them, upon his dereliction or quitting his claim, no one at all has any exclusive right in them ; and confequently they become common to all alike. Property in goods ceafes, when the owners of them are extinct ; becaufe property and a proprietor are relative terms, fo that one of them cannot fubfift without the other : property is the exclusive right, which a perfon has to fuch goods, as are, upon account of this exclusive right, called his own, or his property ; if therefore the perfons, who had fuch right, ceafe to exift, the goods are no longer the property of any one.

It is poffible however, that goods, which are relinquished by their owners, or goods, which ceafe to have any particular owner, may not fo far become common, as that any perfon, who pleafes, is at liberty to feize

§ Grot. L. II. C. IX. § 1.

upon them, and by such occupancy to gain property in them. Where a body of men have seized upon a tract of land in the gross, and have by such occupancy acquired a general property in it; if the individuals, of which this body is composed, acquire private or particular property afterwards in the several parts of this land, either by an express division and assignment made by the collective body, or by particular occupancy with the allowance and consent of such body; then upon the dereliction or failure of these particular owners, the land returns into the state, in which it was before those individuals had acquired particular property in it; that is, it again becomes the general property of the collective body. No person therefore is at liberty to seize upon such parcels of land, as have thus ceased to be in private property: because, though they have no particular owners, they have still a general owner; the collective body has the same exclusive right to them, that it had before any of the individuals acquired private property in them.

This principle does not naturally extend to moveable goods. Though the land, and such immoveable goods as adhere to it or may be considered as parts of it, were originally seized upon by the collective body, and are therefore matter of general property; yet each individual may well be supposed to have acquired property in many sorts of goods, before he settled with the collective body upon that particular tract of land. What plate or jewels, what money or cloaths he brought with him, are his own; they are not parts of the land, and can scarce be supposed to have been acquired with it. If he had caught and tamed cattle for his use; his right to his sheep, or horses, or oxen, which he had so caught and tamed, is not derived from the collective body; these goods were his own, not only

before he settled with such body, but perhaps even before he joined himself to it. When therefore such goods as these are relinquished by their owners, or when the owners of them fail; if the collective body, of which they were members, has any general claim to the goods; that is, if these goods become the property of such collective body, so as not to be free for any person, that pleases, to seize upon them, and make them his own; this effect must be produced either by the consent of the several owners, or else it must arise accidentally from the claim, which the body has to the land. All foreigners, that is, all who are not members of this body, are excluded from seizing upon such moveable goods, as have no owner, and are found upon that land, in which the body has general property: because they have no right to come upon the land for this or for any other purpose of their own, without leave. So again, when any parcel of land is returned to the public, upon the failure or dereliction of the private or particular owners; such moveable goods, as have likewise no owner, and are found upon that parcel of land, will become the property of the public: because, as they have property in the land, no individuals, even though they are members of the public, can claim to come upon it in order to seize upon those goods, and by such occupancy to make them their own. But where moveable goods having no owner are found upon land, which has an owner; if the owner of the land, being likewise a member of the collective body, may not seize them, so as to make them his property by occupancy, he must be precluded by some express law of that body. If this law is considered merely as a positive one, the justice of it is to be defended upon the principle already mentioned of its being established by the consent or agree-

ment of the several individuals : or it may be considered as declarative, that the public grants out its general property in the land to individuals with this reserve, that whatever moveable goods having no owner are found upon it, they shall be seized for the use of the public, and not of the individuals.

C H A P. IV.

Of the limitations of property

- I. Property limited in respect of continuance, use, or disposal. II. Limitations arise from the proprietor, or from some other person. III. Limitations in respect of continuance. IV. Services, or limitations in respect of use. V. Limitations in respect of disposal.*

Property limited in respect of continuance, use, or disposal.

I. FULL property in a thing is a perpetual right to use it to any purpose, and to dispose of it at pleasure. Property, in the strict notion of it, is such a right to a thing, as excludes all persons, except the proprietor, from all manner of claim upon it. No person therefore can, consistently with such a right, take the thing from him at any time, or hinder him in the free use of it, or prevent him from disposing of it, as he pleases. If any other person can claim either to take the thing from him at any certain time, or to hinder him at all in the free use of it, or to prevent him from disposing of it, as he pleases; he has not, in these respects an exclusive right to it; that is, his exclusive right, or property in the thing, is so far limited. These then are the limitations, to which property is subject; they are limitations, in respect of its continuance, or in respect of the use of what we have property in, or in respect of the disposal of it.

Limitation arise either from the proprietor or from some other person.

II. A mans property may be limited in any of these respects, either by his own act, or by the act of some other person. He limits it by his own act, if he consents either expressly or tacitly to give any one, besides himself, any claim upon what is his. If this is done by express consent, we call it a grant. If it is

done by tacit consent, we call it usage or custom. His property is limited by the act of another, though not indeed wholly without his own consent, if he receives a thing by gift, or by purchase, and the person from whom he receives it, makes it over to him under limitations. The act of the person, who makes the thing over to him, is principally considered; because the limitations are made at the motion and discretion of that person: but yet his own consent concurs with this act; for he was at liberty to have refused accepting the thing under those limitations, if he had thought proper.

III. If lands are granted to a man for a term of years, with full power, whilst that term lasts, to use or to alienate them; he has property in these lands, but not full property; he has an exclusive right to use and dispose of them, but this right is limited in respect of its continuance. If a man grants away the reversion of his estate, and this grant is to take place at his death; he limits his property, in respect not only of its disposal but of its continuance too, by his own act. Indeed his property might have ceased at his death, though he had made no such grant; yet if it had not been made, there are natural ways, by which, if he pleased, he might have continued this property in other persons, even after his death, to an indefinite time.

Limitations in respect of continuance.

IV. Limitations in respect of the use of things, in which we have property, are called services. If the owner of a thing has not the full and free use of it to himself, that is, if any other person, notwithstanding his property in it, can claim either to use the thing, or to hinder him from using it, in what manner he pleases; the thing is then said to be charged with a service due to the person, who has such a claim.

Services, or limitations in respect of use.

It may not perhaps be thought foreign to our present purpose, to take notice of the effects produced

by some of those services, which the goods of one man may owe to another. Services may be divided into two sorts, personal and real. ^g Indeed all services, when we consider them as rights, belong to persons: but then some of them belong to a person considered simply, or merely as a person; and these are what we call personal services, to distinguish them from others, which belong to a person, not considered simply, or merely as a person, but as a person possessed of some particular thing. This latter sort, though they belong to a person, as well as the former, yet because they do *rem sequi*, follow the possession of a thing, are called real services.

^h The principal personal service is usufruct, or use and profits, which is a right to use the property of another and to enjoy the advantages arising from it, without impairing the substance of the thing so used and enjoyed. The fruits or advantages of a thing, which is a man's own, naturally belong to the owner of it: he may therefore, if he pleases, grant them away, provided they can be separated from the thing itself; and yet still retain a right to the disposal of the thing, that is, to the disposal of the substance of it, which is all, that after such a grant, belongs to him. But it is to be observed, that this limitation of property, which is called usufruct, can take place only in such goods, as can be used without being consumed, such as lands, houses, slaves, horses, books, &c. For in things, which are necessarily consumed in the using, the substance and the use, or the property and usufruct, if we may so call it, are inseparable from one another. There seems however to be something like a right of use and profits different from property, in these things, which shews itself whenever they are lent. If, when wine, or grain, or money are lent, the full property in them was

^g Grotius Lib. I. Cap. I. § IV. ^h Puffend. B. IV. Cap. VIII. § VI, VII, &c.

transferred by the lender to the borrower, a loan of such things as these would not differ from a gift. And yet, in the mean time, if the borrower had no sort of property in the substance of the thing made over to him, he could not use what he has borrowed; because the use and substance are so united to one another, that no use can be had of such things without breaking into the substance itself. Under the article of contracts this matter will be fully explained. At present it will be sufficient to observe, that where things, which cannot be used without being consumed, are lent; the borrower has a property in the things made over to him by the lender: but then this property is not full and absolute, it is limited in respect of time. His property continues only during the lenders pleasure; if no particular time of payment has been fixed: but if there is a fixed time for payment: then the property continues till that time comes. The other sorts of personal services, such as bear use, dwelling, work of slaves, as the Roman law explains them, are only more restrained instances of usufruct: and any of these are limitations in respect of use upon the property of him, whose goods owe such services: he cannot have the full and free use of them, where others have any claims of this sort upon them.

Real services due to any person upon account of some estate, which belongs to him, are certain advantages, which the estate of another owes to his: and the other, whose estates owes such service, is limited as to his property in respect of the use of it. For if any person, besides himself, may lawfully claim to use what belongs to him, or if he may be lawfully hindered by any other person in using it himself, he cannot, in either case, be supposed to have the full and free use of it. These services are divided into services

of city estates, and services of country estates: But under the notion of city estates, the Roman law includes not only such, as are actually in a city, but likewise all buildings, wherever they are situated, which are intended for the habitation of mankind, or for the exercise of commerce. Such are the services of bearing a burden; where my neighbour has a right of letting his house rest upon my wall, or my pillar: the service of receiving dropping water; where he has a right of conveying water, through spouts or gutters, into my yard: the service of not receiving dropping water; where he has a right to hinder me from turning such spouts or gutters into his yard: the service of jutting or shooting out; where he has a right to extend his buildings in such a manner, as to hang over my ground: the service of not raising a building higher; where he, for the profit or convenience of his house, has a claim upon me not to build beyond a fixed height: the service of lights; where I am obliged to admit his making windows into my yard or garden: the service of not hindering lights; when I can raise no building upon my own ground, so as to obscure his windows: the service of prospect; where I am bound to let my neighbour look freely into my estate: the service of receiving a water course; where I am bound to grant a passage to water-pipes through my house, for the benefit of his: the service of sinks; where I am bound for the convenience of my neighbour's house to suffer his sink to pass through my grounds. Instances of services due from estates in the country are path-way, drift-way, and road. A path-way is a right, which my neighbour has, of walking through my grounds, upon account of some particular estate, which he is possessed of, and with which this right is connected. Drift-way is a like right not only of walking,

but likewise of driving his cattle or carriages through them. And a road, is a right of passing, going, walking, driving, carrying, or drawing through them, either to a town, or to some highway, or to a ferry, or to a bridge, or to some estate of his own. In these and many more instances of the like sort, the use of my property is limited: I cannot do what I will with a thing, which belongs to me: because some other person has a claim upon me to submit to an inconvenience, or not to reap an advantage, which, if there had been no such claim, I should not have submitted to, or should have reaped.

V. Though a man cannot be understood to have any property in a thing, when another person has a full right to dispose of it, yet property may be conceived to continue, where the proprietor has not a right to dispose of the thing as he pleases. This seems to be the case of an estate, which is held in trust. For though there is commonly another limitation of such estates in respect of the use; by which limitation the trustee is obliged to dispose of the profits arising from them to certain purposes; yet are they attended too with a limitation in respect of the disposal of them, where the trustee is no more at liberty to dispose of the estate itself at his own discretion, than he is to dispose of the use and profits of it. In the case of pledges, the property of the person, whose goods are pledged, is limited as to the disposal of such goods. Pledges are such goods, as the debtor puts into the hands of the creditor, or assigns over to him, as a security, that upon failure of payment the creditor shall have property in the thing pledged. If moveable goods are pledged, they are called pawns; if immoveable ones, they are called mortgages. In both cases the owners property is limited in respect of the disposal of the thing, till the debt is paid; because the creditors right of security would be broken in upon, if the debtor was to dispose of it.

Limita-
tion in re-
spect of
disposal.

C H A P. V.

Of our common Right to Things.

- I. *What things are still in common.* II. *The ocean is not in property.* III. *Some waters admit of property.* IV. *Wild beasts, birds, and fishes are in common till taken.* V. *The right to take wild beasts, &c. may be restrained as to its exercise.* VI. *Right of extreme necessity sets aside property.* VII. *This right is subject to three limitations.* VIII. *Right of harmless profit on what founded.* IX. *This right is precarious in its exercise.*

What
things are
still in
common.

I. ⁱ **A**LL things may be divided into such, as are in common, and such as are in property. Such things are still in common, as either from their own nature never could be appropriated, or though in their own nature they might be appropriated, yet in fact never have been. We will consider the rights, which belong to all mankind in common, in respect of things of each sort.

The ocean
is not in
property.

II. ^k The ocean, either as to the whole, or as to the principal parts of it, does not admit of property, but remains still in common to all mankind, notwithstanding the introduction of property in other things. The first reason, that we urge in proof of this, is only a moral or probable one. It is not likely, that mankind should ever think of gaining an exclusive right to the ocean; because there was no reason for it, no cause or motive, which might induce them to it. And though, where an act appears evidently to have been done, we

ⁱ Grot. L. II. C. II. § I.

^k Grot. ibid. § III.

could never disprove the existence of it by alledging, that there was no reason for doing it; yet, where it is doubtful whether an act has been done or not, the conclusion is probable, that it never has been done, provided no reason can be found, why it should. ¹ Now the general reason for appropriating other things is, that the same thing would not answer the purposes of all the joint-commoners, who might have occasion to make use of it, at one and the same time. But the ocean, whilst it continues in common, is not liable to this inconvenience: it is large enough to answer the occasions of all mankind, either to sail upon, or to fish in, or to fetch water from. We therefore conclude, that it was never in the intention of mankind to appropriate it, or to acquire an exclusive right in it; because the general reason, for acquiring such a right in other things, could in respect of the ocean have no weight with them.

We may say the same of large banks of sand, which are sufficient to supply all men, who want to use the sand, either for ballast, or for any other purpose. The same reasoning is likewise applicable to the air; as far as any use can be made of it, without making use at the same time of the soil or the water.

But besides this moral reason, arising from the want of intention in mankind to acquire an exclusive right in the ocean, there is a natural one, which shews, that no such right ever could be acquired. ^m Occupancy cannot proceed so as to give property, unless in such things as are certain and determinate. The soil or land, though the parts of it are in continuity or join to one another, is distinguished into parcels by hills or mountains, by brooks or rivers: and where these natural boundaries are wanting, parcels of it may be distinctly set out by fences, or plantations, or other

¹ See Chap. III. § V.

^m See Chap. III. § VIII.

artificial land-marks. But the surfaces of fluids are, in their own nature, so smooth and yielding as not to admit of being distinguished into parcels, by any such natural or artificial boundaries. If they are thus set out at all, it must be by the banks or shores, in which they are contained. Now the ocean is not contained within banks or shores : for it rather encompasses the land, the continent as well as what are commonly called islands, that is encompassed by it. The natural uncertainty therefore of the thing, both as to the whole of it, and as to its principal parts, renders it incapable of being appropriated by occupancy. Mariners indeed and geographers divide and set it out by the artificial measure of degrees in latitude and longitude. But as these are not lasting and visible limits ; they cannot so distinguish the ocean into parcels, as that one part of mankind should be able to find out what another part design to make their own, without express information ; and consequently they cannot make the ocean capable of being appropriated ; unless all the parties were to meet, and enter into an express agreement about settling the limits of each others property. Such an agreement as this is what we call division. But if property in the ocean cannot be introduced any other way than by division, no property can be introduced in it at present, " as has been shewn already. And formerly, whilst mankind were few, and lived near together, so that they could readily meet, the ocean, or however far the greatest part of it, was unknown to them, and consequently could not, at that time, be measured, divided, and assigned. Since therefore property in the ocean could not be introduced either by occupancy or by division, the necessary consequence is, that it is not capable of being appropriated at all.

" See Chap. III. § IX.

III. The case of ^o rivers, bays, streights, pools, or lakes is different from that of the ocean. For though, as fluid bodies, they are not set out into certain and determinate parcels by any marks or limits upon their surface; yet as they are contained within banks or shores, which are near to one another, they are by this means made certain and determinate enough to admit of property by occupancy.

Some waters admit of property.

IV. ^p Many things, which in their own nature admit of occupancy, so that an exclusive right to them may be acquired, have yet in fact never been appropriated, because no one has seized upon them for this purpose. Of this sort are wild beasts, birds, and fishes, which have never been caught, or after they are caught, have escaped from us; islands, which are uninhabited, or such tracts of land, either in islands or on the continent, as no person has yet settled upon.

Wild beasts, birds, and fishes, are in common till taken.

As to wild beasts, birds, or fishes, since they are part of the common stock, any person may of common right take them for his own use or diversion; and occupancy without interruption will give him property in them. But then this property is very precarious; because it continues no longer than possession. Whenever such animals have made their escape, the natural presumption upon account of their wildness, is, that they can be recovered no more: and consequently their former owner must in all reason be understood to give them up or relinquish them. This property however as precarious as it is, seems to be more, than the mere exercise of a common right to take and to use them: because, if he, who takes them, can make them tame, so that by loss of possession he does not lose all prospect of recovering them, his property in them will be fixed, even after they have escaped from him; and he may claim them wherever he finds them. And it farther ap-

pears that the right to such animals, when they are taken, is more than a common right to part of a joint-stock; because no reason can be given, in the nature of the thing itself, why any person may not take more such animals, than he wants for his own use: and as long as he can keep possession, what he has so taken are his own to dispose of in any manner, that he pleases. His right therefore, whilst possession continues, is not merely a right to use, but an exclusive right of property.

The right
to take
wild
beasts, &c.
may be re-
tained as
to its exer-
cise.

V. But though no reason, in the nature of the thing, can be given, why any person may not lawfully take as many of these wild animals, as he will; yet his right of taking them at all is limited, by a reason drawn from the consideration, that other men have property in such things, as he must make use of in order to take them. No man can hunt, or fish, or fowl, without using the soil or the water. If therefore others have an exclusive right to the soil or the water, which he has occasion to make use of in following these diversions; as he cannot claim to use their property, he cannot justly claim the liberty of hunting or fishing or fowling, on such lands or such rivers as belong to them. It may perhaps be asked how he can justly be hindered from exercising a right, which he enjoys by the law of nature, a right of taking and using, or even of appropriating such animals as do not belong to any one; since such a hindrance or interruption seems inconsistent with the law of nature? But to this we reply, that fishing, hunting, or fowling are originally matter of natural right, not because the law of nature commands them, but because it does not forbid them. Now though no act of man can take away the liberty of doing what the law of nature commands; yet there is nothing, that can prevent such act from taking away the liberty of doing what the law has left indifferent; provided the parties,

to whom such liberty belongs, give their consent to it. This in respect of hunting, fishing, or fowling, though it was not done expressly, was done tacitly and of necessary consequence by the introduction of property in the soil or the water. For it is unintelligible to suppose, that one man has an exclusive right in the soil or the water, and yet that another may use them, if he pleases, to these purposes. To give any other person besides the proprietor such a claim, after property is introduced, some reserve must be shewn, and an express reserve too, of this liberty: for otherwise the common or general liberty of using the soil or the water for the purposes of hunting, fishing, or fowling, is as effectually given up by the introduction of property, as the general liberty of using them to any other purpose whatsoever.

VI. § It may seem strange, that we should enquire, whether all mankind can in any circumstances or in any instances claim of common right to make use of such things, as are appropriated to particular persons. For since property is an exclusive right to the things appropriated; it seems to have wholly superseded these common claims of mankind. We shall however find upon enquiry, that the fact is otherwise, and that in some circumstances our common right to the use of things remains, even after those things have been appropriated, and have their distinct and respective owners.

Right of
extreme
necessity
sets aside
property.

Grotius maintains, that there are two instances of such a common claim: the first he calls the right of extreme necessity; the latter the right of harmless profit. In support of the right of extreme necessity we may urge with him; that when mankind first agreed to divide the common stock amongst them; or when afterwards they suffered any one to acquire property by occupan-

cy; if they had been asked, whether they consented so effectually to exclude themselves from what they agreed to appropriate, as never to claim any use of it, even though it should be absolutely necessary to their own preservation? It is most likely they would have answered, that they intended no such thing, but agreed, to the introduction of property for the convenience of all, and not for the destruction of any. And since the claim, which the proprietor of a thing has to it, depends upon the consent of mankind; this claim must be subject to all the limitations, which they designed to lay it under, and can extend no farther, than they designed it should extend.

We may urge in support of the same right of extreme necessity, that no compact, either express or tacit, could so introduce property, as to be binding without such a limitation. For since the right, which a man has to his life is unalienable; as will appear hereafter; he cannot alienate the natural right, which he has to the necessary means of his own preservation. However therefore mankind may have consented, that particular things should be possessed in property by particular persons; yet in whatever respect such things become absolutely necessary for the preservation of individuals, they still continue in common. So that extreme necessity sets property aside, or makes it lawful for persons, who labour under such necessity, to use those things, in which others have property, as if the things were still in common. Thus, where a man must have starved otherwise, it is naturally no theft, if he takes victuals, which is not his own: because, though the owner of what is so taken has, in respect of all other men, an exclusive right to it; he has no such right in respect of the necessitous person. You may say indeed, that it is not the pro-

perty of the poor man, who takes it : which we readily allow. But then we contend, that, in respect of him, it is not the property of the person, from whom he takes it. If it was, you might easily prove this act to be theft, unless the owner consented to his taking it : because theft consists in taking away the property of another without his consent. But you should observe, that where there is no property, there can be no theft. And if, in order to prove the poor man's act to be theft, you will assume, that the person, from whom the thing is taken, has property in it ; you either take the matter in question for granted, or else you are guilty of a fallacy. If when you assume, that the person from whom the thing is taken, has property in it, you mean, that he has property in respect of the poor man ; or that, as the owner has a right to exclude all others from the use of the thing, so he has likewise the same right to exclude him, you take the matter in question for granted. But if when you assume this in general, you mean only, that he has property in respect of all others, you are guilty of a fallacy ; you have more in your conclusion, than is contained in your premises : you assume only, that he has property in respect of some, and conclude, as if he had property in respect of all.

To this head we may likewise refer the right, which we have, in case of fire, to pull down our neighbours house in order to preserve our own ; the right, which we have to cut the nets or cables of another man, where our own boat is entangled with them, and must otherwise sink ; the obligation on ship-board which each person is under, in a scarcity of provisions, to bring out his his own stock and to leave it in common ; the right, which in a storm all, who are on board, have to demand that each person shall throw so many of his

goods into the sea, as would overburden the ship; and lastly the right which a nation at war has to seize upon and garrison a place of strength, in a neutral country, when it is morally certain, that the enemy would otherwise get possession of it, and by that means be enabled to do them irreparable damage. For though, in some of these instances, the preservation of life may seem not to be immediately concerned; yet at least the reason, upon which Grotius supports the right of extreme necessity, is applicable to all of them. It is not probable, that mankind, when they consented to introduce property, should design to extend that claim to cases, wherein such an exclusive right would force them to suffer what is beyond the ordinary patience of human nature.

The right of extreme necessity is subject to three limitations.

VII. ^r This right of extreme necessity is subject to such restrictions, as will keep it from being abused, and from being made a pretence to encroach upon the property of others, where we have no claim. The restrictions are these three, which follow.

First, all other methods are to be tried, as far as the necessity will allow of, such as a request to the owner or an application to the magistrate, before we make use of such things, as are the property of another. The reason of this restriction is evident. No necessity can be called extreme, or in effect there is no necessity at all, where our occasions or calls may be answered by the use of such means, as are in our power. Indeed in our own country where the civil laws have provided for the poor, there can be no necessity, which the rigour of the law will allow to be a sufficient ground for taking and using such food or such cloathing, as are the property of other persons: because as the law has made a provision for the supply of such wants, it cannot suppose them ever to happen. And yet if, in the

^r Grot. *Ibid.* § VII, VIII, IX.

execution of the law, it should appear, that, notwithstanding the legal provisions to the contrary, in some particular instance such an extreme case has happened, the magistrate would be wanting in natural equity, if he did not mitigate the rigor of the law against theft, as far as he is able.

A second restriction of this right of extreme necessity is ; that it fails, when the proprietor is under as great necessity, as the other claimant. For where the necessity is equal on both sides, the claim of the possessor is the better of the two : because the effects of necessity is only to overrule the right of property, and to make the thing in question common to the parties concerned. But in the exercise of our right over such things as are in common, where the parties equally want to use them, the first occupant has the best right to use them first : and in the case now before us, the possessor stands in the place of the first occupant.

A third restriction is ; that where we have taken things, which were not our own, and have used them, in virtue of this right of extreme necessity, we are obliged, if it ever is in our power, to make amends to the owners of them. This restriction seems to be so inconsistent with the right, for which we have been contending, that some have imagined we must either give up the restriction, or give up the right. If I have a right to use the goods, which my necessity calls for, where can be the obligation to restitution ? since all obligations of this sort imply, that I have injured another by taking from him what I had no right to. Upon supposition therefore of a right to use such goods, there can be no obligations to make amends for it. Or if on the other hand we will contend, that there is an obligation to make restitution, we must allow, that the person in necessity had no right to take and to use

the goods which he stood in need of. But to this we may answer, that a right to take and to use such goods, as we cannot do without, and an obligation to make restitution for the exercise of that right, are indeed so inconsistent with one another, that they cannot possibly subsist at one and the same time. So long as my right subsists, I can be under no obligation to make restitution upon account of my exercising that right. But then they are not so inconsistent, as to prevent them from subsisting at different times. My right subsists as long as the necessity continues, which is the foundation of that right; and so long there is no obligation to make restitution. But as soon as my necessity ceases, the foundation of my right is taken away, and consequently my right ceases with it. And it is then and not till then that the obligation to restitution begins.

Right of
harmless
profit on
what found-
ed.

VIII. ^s The right of harmless profit is the right of using another man's property for our benefit, where the owner suffers no harm by our use of it. This right may be easily made out in theory; but when we come to the exercise of it, we shall find it so precarious, as to be in effect no right at all. To support this right, we must look back to the general reason for introducing property, which was the impossibility, that the same thing should at one and the same time answer the uses, which all or many might have for it. Now the claim of property or the exclusive right to a thing extends no farther, than the intention of mankind extended, when they introduced it: and their intention cannot be understood to have extended any farther, than the motive or reason, which engaged them to introduce it. Therefore one man's property in a thing does not exclude another's right of harmless profit: because this right takes place in those instances only, where the owner suffers no harm, that is, in those instances only, where the thing will answer all the pur-

^s Grotius, *ibid.* § XI. &c.

poses of the proprietor, notwithstanding the use, which the other makes of it.

IX. But this claim, as well as it may seem to be established in theory, will be found, as to the exercise of it, to depend upon the will and consent of those, who have property in the goods, that we have occasion to make use of for our own benefit. No right of this sort can be pretended, unless where our use of what is another man's property will do him no harm. But the proprietor himself must determine, how far such use of his goods will be harmless: because his right in the goods would have no effect, or would be no right if he could not exclude us from using them, whenever we pretend, that he will receive no damage from such use. If therefore he is to determine, how far he is likely to suffer any harm by the exercise of our right, before we can claim to exercise it; we cannot make use of his goods in virtue of such right, till we have his consent. This is plainly in effect no better than no right at all: because where there is no pretence of a right to use the goods of another man, we may in any instance lawfully use them, if he gives his consent.

Such
right is
precarious
in its exer-
cise.

We may be farther informed about the precarious nature of this right, as to the exercise of it, if we go on to examine some of the principal instances of it, which Grotius has mentioned. Those, says he, who have occasion for a passage over our land or upon our rivers, either to seek a new settlement, when they are driven from their own country, or to carry on any commerce, or to recover by a just war what has been taken from them, or for any other lawful purpose, have a claim to such passage. Let us see therefore, how far such a demand can be justly supported against the proprietor. A nation, which has jurisdiction over the soil or water, or which has property in them, might object in parti-

cular to the passage of an army, that they are afraid of suffering some irreparable damage, if they were to allow such a number of armed men to come amongst them. To this difficulty Grotius replies, that your fears cannot take away my right. But it is to be observed, that though such a general answer might be sufficient in other cases, yet it cannot remove the objection, which is urged, in the present case: because no use of my property can be called harmless to me, if it exposes me to such losses, as I should have been in no danger of suffering without such use. It may be true, that my fears cannot take away your right: but then it cannot be true without an exception of those cases, in which the very being of your right depends, as this of harmless profit does, upon my security. Perhaps indeed, even in this sort of right, it might be more proper to say, that my fears prevent your right, than that they take it away. But which ever of these two expressions is the more proper, the effect is the same: there cannot be any right of harmless profit over the property of another man, where the owner has good reason to apprehend, that he shall be a loser by the exercise of such a right. Our author however urges farther, that sufficient caution may be given to the owner to indemnify him against any loss, that he may be apprehensive of: he may, in the instance now before us, insist, that the army shall pass in small companies, that the men shall not be armed, that a guard shall be hired for him at their expence, and that hostages shall be put into his hands, as a security for their good behaviour in their passage. Now the necessity, which our author allows there may be, for taking such cautions as these, and the right, which the proprietor has to insist upon them, plainly proves, that without this security, there would be no

claim to use his property. But since sufficient caution is a vague thing, and since the proprietor alone can be the judge what caution is sufficient ; he has such an opportunity of disappointing this right, in the exercise of it, as makes the right itself not worth having.

But Grotius goes one step farther, and maintains, that men have not only a right to demand such a passage for themselves, but for their goods too ; when they want to carry on any trade or commerce : because, as such an intercourse of any one nation with any other is for the general good of mankind, we can have no right to hinder it. But this reason, if we allow it all its weight, can only prove, that by hindering this intercourse we shall not contribute so much as we are able to the general good of mankind. And if this be all, the demand of passage is only a right of the imperfect sort ; and they, upon whom it is made, are at liberty to judge for themselves, how far it is convenient for them to allow it to take effect. How can we in this instance, says our author, be properly said to sustain any damage by their passage ; since whatever benefit we might be able to make by carrying on that trade exclusively, which they want to have a share in, it is such a benefit, as we could only hope for, and not such an one, as we could claim of strict right. But, whether the loss of such a benefit can be called in strictness of speaking a damage or not, is not worth enquiring. Perhaps it is not properly a damage. Yet certainly if the situation of our country is such, as gives us an opportunity of carrying on any branch of trade exclusively, by denying others the use of our land or the use of our rivers ; they cannot claim such use as a matter of harmless profit : because whatever will make our property less beneficial to us can never be reasonably looked upon as harmless to us.

We are obliged likewise, as our author adds, to allow those, who are passing by us, to stop for a while, and even to build extemporary huts, or pitch tents; if they have occasion to stop in this manner for the recovery of their health: for this is to be reckoned amongst the harmless uses, which they may have from our property. But certainly it is not universally true, that such an use of our property will be harmless to us. Suppose, for instance, that they should be ill with the plague, or with any other infectious distemper; their stopping amongst us would not be harmless. We must therefore be allowed, at least, to have a right of being satisfied, whether their distemper is infectious or not, before they can claim to stop for the recovery of their health. And if they cannot claim, till we are satisfied of this; their right will be so vague and so much in our power, that it can only be reckoned amongst the imperfect ones.

C H A P. V I.

Of derivative acquisitions, by the act of man.

- I. *Derivative acquisitions are of two sorts.* II. *Mutual and notified consent of parties necessary in those made by the act of man.* III. *An alienation may be revoked before acceptance.* IV. *Acceptance may go before alienation.* V. *Property may be continued after death by a will.* VI. *Aliens how incapable of inheriting by will.*

I^t **D**erivative acquisitions are made either by the act of man or by the act of the law. Where the property, which one man has in a thing, is transferred to another; either the owner transfers it with his own consent, and then he, who acquires it, makes a derivative acquisition by the act of man; or else the law takes the property in the thing from one of them, and gives it to the other, and then he, to whom it is so given, makes a derivative acquisition by the act of the law. When the property in things passes from one person to another by the act of the former, he, who so parts with the things is said to transfer or alienate them, and he, to whom they are so transferred is said to acquire them.

Derivative acquisitions are of two sorts.

II. "The proprietor or owner of a thing, when the law does not interpose to take it from him, cannot cease to have a right in it, unless he designs to part with it: an injury is done him, if it is taken from him without his own consent. On the other hand, no property in a thing can be acquired without the design or consent

Mutual and notified consent of parties necessary in derivative acquisitions by the act of man.

^t Grot. L. II. C. I. § I.

^u Grot. ibid. § I. II.

of him, who makes the acquisition; nothing can become his own, unless he has a mind to make it so. From hence it follows, that in all derivative acquisitions by the act of man, a design or consent to alienate the thing is necessary on one part, and a design or consent to accept it is necessary on the other part.

But besides the mere consent of parties on both sides, it is farther necessary, that this consent should be sufficiently made known or signified by some outward sign or mark, such as words, or actions, or both. For a consent, which does not appear, can no more fall under the notice of mankind, than a consent, which does not exist: and consequently the law of nature cannot allow, that, in respect of mankind a consent or intention, which rests in the mind only, and is not sufficiently declared, should produce any effect: such intention being as if it had never been, the property in a thing can neither be transferred nor acquired by it.

An alienation may be revoked before acceptance.

III. But since the declared consent both of the giver and receiver is necessary, before any derivative acquisition can be made by the act of man; it follows, that, though the giver has declared his consent, and so has done all, that was necessary on his part, towards alienating his property; yet such alienation may be recalled at any time, before acceptance is declared on the other part: because, till acceptance is declared, the party, to whom the giver designed to alienate his property, has no claim upon it. Perhaps it may be thought, that, notwithstanding one of the parties gains no claim to the thing for want of acceptance, yet the other party has, by alienating it, as far as was in his power, lost his claim to it. But in order to clear up this mistake, we should take notice of the difference between dereliction and alienation. Dereliction is the absolute giving

up of property: so that he, who relinquishes what is his, loses his right in it, though no other particular person acquires that right. But alienation is the giving up of property for the use or benefit of some other particular person, or in order that this other person may acquire property in it: so that if he, for whose benefit the thing was to have been alienated, fails of acquiring property in it, the alienation produces no effect, or is as if it had never been. He who made the alienation had no design of quitting his claim, but in order that a certain person might acquire it: and consequently, if this person, either through his own default or by any other accident, does not acquire it, his property continues in him, as it was before; this being the only purpose, for which he had any design of parting with it.

IV. When the property of one man passes by his own act to another; the most natural order is, that acceptance should follow alienation. But this order, though it is most natural, is not necessary. For acceptance is sometimes understood to have been made before alienation; so that the transfer is complete immediately upon alienation, and cannot justly be recalled, though no acceptance should follow it. If I ask for a thing, I am plainly willing to accept it: and if, upon my asking, it is given me, the transfer is complete without any farther acceptance: because I am understood to be still in the same mind, as when I asked for it, unless I expressly declare the contrary.

Acceptance may go before alienation.

V. From the power, which a man has of alienating his property, in what manner and upon what condition he pleases, it follows, that he may naturally prevent his property from ceasing upon his death^w by making a will, and disposing of it in his life-time.

Property may be continued after death by a will.

He, who has full property in a thing, may alienate it, either absolutely or conditionally. As far as the law

^w Grot. *ibid.* § XIV.

restrains him from doing this, his property is not full but limited. As he may alienate it conditionally, so likewise, for the same reason, he may choose his own conditions. Amongst other conditions, which he might have chosen, suppose him to choose, that the alienation shall so depend upon the event of his own death, that whatever he says or does towards alienating his property shall be understood to be complete on his part, when this event happens, and not before. The effect of such a condition would be, that he might recall the alienation at any time before his death; because the transfer is so far from being completed by any acceptance on the other part that the alienation itself is not complete on his part till this event happens. And if such a conditional alienation may be recalled, at any time before his death, a new disposition of the thing so alienated may be made; he may, notwithstanding what he has done already, make a like conditional disposition of it to any person, that he pleases, or he may sell it, or he may give it away absolutely. It is plain therefore, that if he retains such a right in the thing, after it is thus conditionally alienated, such an alienation is so far from being inconsistent with his property in it, that it does not so much as restrain or limit such property.

Now an alienation of the sort that I have been describing is a will or testament. For a will is nothing more than a conditional alienation, which is to take place upon the event of the testator's death, without affecting his property in the thing disposed of, till this event happens. Supposing therefore property to be introduced, the right of making a will, and of disposing of the things, in which we have property, by such will naturally follows from it.

However we are to observe, that this right may not only be regulated, but may even be taken away, either

by exprefs compact, or by civil law. But then, as far as it is either restrained or taken away, our right of property is limited: becaufe, as has been feen already, the right of making fuch a conditional alienation is neceffarily included in the right of full property.

Perhaps it may be asked at what time the property in a thing deviſed by will is alienated by the teſtator. It does not appear to be alienated before his death; if we have given a true account of the nature of a will: and it cannot be alienated after his death; becauſe after he is dead, he has no power of acting at all, ſo as to alienate his property or to do any thing elſe. Nor can we properly ſay, that it is alienated at the very inſtant, when he dies: ſince the will, which is the inſtrument, whereby he makes the alienation, was made before that inſtant. The fact is, that the alienation was made before his death, but made conditionally: he conſented to transfer his goods to the perſon, whom he appoints to be his heir, upon condition of his retaining the full property in them, till the time of his death, and of the heirs claim not taking place till this event happens. Now this latter condition ſuſpends the effect of his alienation, or renders it incomplete, till the event of his death: it was indeed ſo far perfect on his part, that after the will was made, there was no occaſion for any farther act of his to make it more perfect; nothing was wanting, but that the event ſhould happen, upon which the heirs claim, given him conditionally before, was to take place and become abſolute.

It ſeems indeed to be neceſſary by the law of nature, that the heirs acceptance, without which he acquires no property in the thing deviſed by will, ſhould be made before the teſtators death. There will otherwiſe be an interval of time paſs, in which the goods will

have no owner, and consequently will be open to the first occupant. This interval of time is what passes between the testators death and the heirs acceptance. The testator has then no property in the goods, because he is not in existence: and the heir has no property in them for want of acceptance. The occupant therefore, who is some third person, cannot naturally be said to injure any one, by seizing upon such goods. From hence it appears, that if a will obtains its effect, where the heir has not accepted, before the death of the testator, it must either be accidentally, because no third person has been before-hand with the designed heir in seizing upon the goods; or else the will must owe its effect to the aid of some positive law, besides the mere will or appointment of the testator, which law takes the custody of the goods, upon the death of the testator, and hinders all persons from seizing upon them, till it appears, whether the heir will accept or not. We cannot suppose the testators will to be of itself so far binding upon all mankind, as to become a law to them, and hinder them from seizing upon the goods devised by it; since it is well known, that this will is no law even to the heir appointed in it, till he has accepted.

However no acceptance of the heir before the testators death will so far bind the testator, as to make it naturally unlawful for him to make another will and appoint a different heir. For the heir can accept only upon such terms, as the testator offers: and the terms of a will are; that the goods devised to you shall be yours upon the event of my death, under this restriction, that in the mean time the full property in them shall be mine: my design is to retain a right to dispose of them, as I please, till the event of my death happens; but if in the mean time I make no other disposition of them, immediately upon that event they are

yours. If the heir accepts upon these terms in the testators life-time, though such acceptance is sufficient to make the goods his property at the testators death, without any subsequent acceptance; yet, in the mean time, the conditions annexed to the testators alienation are such, as will leave the goods in his power to dispose of in what manner he shall think fit, as long as he lives.

Whenever I speak hereafter of the power of disposing of our goods by will, as naturally incidental to the right of property, without the aid of civil laws; the reader must remember, that I mean a will, under the circumstances just now described, where the heir has accepted before the testators death.

VI. Though the right of making a will is incidental to property, and consequently is coeval with it; yet such property in goods, as enables a man to give them away by will, must be full property, at least it must not be limited in respect of the disposal. There is one natural limitation of this sort not much attended to, which will prevent a will from obtaining any effect. When the occupancy of land and of all its appendages was made in the gross, so that the general property is considered as vested originally in that body of men, by which such occupancy was made; particular property is derived from thence to each individual, as he is a member of this collective body. But what belongs to a man, as he is a member of such body, cannot be his to dispose of to any person, who is not a member of the same body. He cannot transmit his property upon any other terms besides those, upon which he received it: and consequently, as the property, which he has in the land, was derived to him from the community, under the qualification of his being a member of it, he cannot transmit that land to any person, who has not the same qualification. This is a natural bar

Aliens
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inheriting
by will.

against an aliens inheriting land by will: the bar may be considered as arising rather on the part of the testator, than on the part of the alien; it arises rather from a limitation in the testators property, in respect of his right to dispose of the land, than from any incapacity in the alien to accept what the other devises to him. Where the testator has full property, as he has in his moveable goods, which are considered as of his own original acquisition, and not as derived from the general property of the community; such goods are naturally in his own absolute disposal, and he can transmit them as effectually to a stranger, as to one, who is a member of the same community with himself. But then, though such goods as these are naturally in the testators disposal, he may, notwithstanding this, be prevented by the civil law from disposing of them to an alien at his own discretion. For as the community has a general property in the land, where such goods are, it may hinder an alien from coming to fetch them away upon any other terms, than what such community shall agree upon. The only difference then in this respect between land and moveable goods is, that an alien cannot naturally inherit land by will, unless some express law has been made to enable the members of the community to transmit their land by will to aliens: whereas they can naturally so transmit their moveable goods, unless some express law has been made to the contrary.

CHAP. VII.

Of derivative Acquisitions by the Act of the Law.

- I. *Grotius supposes two sorts of derivative acquisitions by the act of the law of nature.* II. *Derivative acquisitions to satisfy a claim how made.* III. *The claim to succeed to the goods of an intestate depends upon conjecture.* IV. *Intestate successions need some other support besides the law of nature.* V. *Inheritance does not arise from a general consent of all mankind.* VI. *A regard to a mans personal duty is the principle, upon which intestate successions were introduced.* VII. *The natural order of succession according to this principle.* VIII. *Children why preferred to parents in intestate successions.* IX. *The same principle governs the succession, where an intestate leaves no children.* X. *Philo is mistaken in his interpretation of the Mosaic law.* XI. *Order of succession may be varied by civil laws.* XII. *The succession of children may be cut off by disberison.* XIII. *Uncertainty of birth hinders a child from succeeding to an intestate parent.* XIV. *Infants, ideots, and madmen naturally incapable of property.* XV. *Law of nations wrongly explained by Grotius.* XVI. *Custody of the law supplies the place of property.*

I. **W**HEN the property of one man is transferred to another by the act of the law; this is done either by the law of nature, or by some positive law. Our subject does not require that we should consider any other transfers of this sort besides what are made by the law of nature.

Grotius supposes two sorts of derivative acquisitions by the act of the law of nature.

* Grotius maintains, that property is acquired derivatively by the law of nature in two instances, either to satisfy some claim of strict justice, or to supply an heir to a person, who dies intestate. In the former of these instances, the acquisition is indeed made by the law of nature; but in the latter of them we shall find, that it is not made effectually without the aid of instituted laws.

Derivative
acqui-
sitions to
satisfy a
claim how
made.

II. If any person has injured us, by taking from us what is our own, or by withholding from us what in strict justice is due to us; the law of nature not only allows us to make reprisals by seizing upon so much of his goods, as is equivalent to what we have lost, where we cannot recover the very thing itself; but it gives us property likewise in the goods so taken. For the law of nature cannot be supposed to hinder us from prosecuting our just claims, or from endeavouring to recover what, by the same law, is due to us. But we have a claim upon him, who has thus taken, or thus withholds, our property from us, to the value of the thing detained. If therefore we cannot come at the thing itself, as we have naturally a claim to an equivalent, the law of nature will allow us it out of his goods. Now the bare possession, of what may in itself be of equal value with the thing lost, is not an equivalent to the injured party; because whatever may be the value of the goods so taken considered in itself, yet the bare possession of them cannot make amends for the loss of property. The claim therefore cannot be satisfied, unless the law of nature, besides allowing us to take possession of goods, which are worth as much as what we have lost, makes over to us likewise the property in such goods.

The claim
to succeed
to the
goods of
an intestate
depends
upon con-
jecture.

III. The property, which any person has in his goods, naturally ceases at his death; and the goods, as having no owner, revert to the common stock; if he

* Grot. L. II. C. VII. § II.

has not disposed of them by will, that is, if he has not in his life-time made an eventual alienation of them, or transferred the property, which he had in them, to some other person, whose claim takes place immediately upon the event of his death. y When therefore a person dies intestate, that is, without having made any will at all, or at least any that appears; whatever claim his relations, or any one else, may have to his goods either moveable or immoveable, it can have no other foundation in nature, but a supposition or conjecture, that he had disposed of them in his own mind, that he had designed to make them over to such claimant, though this design was never declared.

In support of this conjecture it may be urged; that, when a man foresees the necessity of dying, and of being by this means deprived of all benefit or enjoyment of his goods, in his own person, it is not likely that he would lose this opportunity of doing a kindness to such other persons, as he had a regard for, but would suffer his goods to revert to the common stock, or to become the property of any one, who should first seize upon them, after his death. The consequence from this conjecture, supposing it to be well-grounded, would be; that every man does in his own mind appoint a successor to his property; that he intends to convey his goods, when he is prevented by death from enjoying them any longer, to some one or more persons, whose welfare he has at heart, and to whom he is desirous of shewing all proper instances of kindness and regard.

IV. However, if we suppose this conjecture to be ever so well-grounded, yet those persons, who claim to inherit an intestates goods, must have some other law to support their claim besides the law of nature. The foundation of their claim is laid in a supposed intention of the intestate person, which he never declared.

Intestate
succession
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ture.

But according to the law of nature, ² as has in another case been observed already, no effect can be produced by a mere inward design: the outward declaration, by which the design is notified, is as necessary to make any transfer of goods valid, as the design or intention of transferrring them. An intention, which does not appear, can no more fall under the notice of mankind, and is therefore no more regarded by the law of nature, than an intention, which does not exist.

^a Even where a will has been made, if there is no acceptance on the part of the heir, before the testators death, it does not produce its effects without the aid of positive laws. Much less therefore can any natural effect be obtained by a mere conjecture about the design of the deceased; where, as the intention of the ancestor never was declared, it is impossible to suppose that the heir had ever accepted. When a man has made a will, his heir, if he knows of it, may be ready upon the spot, and though he has not accepted beforehand, may accept immediately upon the testators death. But when a man dies intestate, it will commonly be uncertain for some time, whether a concealed will may not appear, which no one knew of: and during this interval, if no positive law takes the goods into its custody, any person may seize upon them, and by such occupancy may gain property in them; since during that interval, they have no owner. Nay the conjecture itself, upon which the whole supposed claim to inherit the goods of an intestate person depends, is too precarious to be the foundation of any right, if there was no other objection to it. We may say on the one hand, that a man could scarce be supposed willing to have his goods become common to all mankind, or pass into the hands of a stranger, when he has an opportunity to dispose of them for the benefit

² See Chap. VI. § II.

^a See Chap. VI. § V.

of those, whom he loved. But then we may say, on the other hand, with equal probability, that his neglecting to dispose of his goods amongst his relations or friends, when he had it in his power, is a sign, that he did not care whether they were so disposed of or not.

Since then the claim, which any person may be supposed to have to the goods of one, who dies intestate, depends upon a very uncertain conjecture; since this conjecture is such an one as, for want of having been declared, the law of nature takes no notice of; and since, even if the law of nature should take notice of it, yet for want of acceptance the goods might be seized upon by some other person, before this law could convey the property in them to the relations of the intestate; recourse must be had to some other law, in order to make out the claim of his relations to inherit his goods.

It may perhaps be imagined, that a man's obligation to maintain his children extends itself to his goods, so as to give them a natural right to such goods after the death of their parent, though he dies intestate. But it is plain, that the general claim to inherit in intestate successions cannot depend upon this principle. If this was the foundation, upon which the claim of inheritance depends, such claim could extend no farther than to his children: his brothers or sisters, his uncles or aunts or any other of his relations in what degree soever, could have no place in the intestate succession. But since, where a man dies without children, the claim of inheritance is, in use and practice, extended to his other relations; we may be sure that this claim is supported upon some other principle, and not merely upon the duty, which a parent owes to his children. We may go one step farther. The claim of the children themselves, where there are any, to inherit the goods of their intestate parent, cannot depend solely upon the

duty of the parent to maintain them. Their claim reaches, at least in use or practice it is supposed to reach, to all his goods : whereas a claim founded in the parents obligation to maintain them can naturally reach to so much only of his goods, as may be necessary for their maintainance. If we examine this obligation of the parent still more closely, we may perhaps find, that it is not only insufficient to give the children a claim to all his goods, but even to any part of them. As the the parents obligation arises from a personal act, whereby he became the cause of the childrens existence, so it rests upon the parents person, and does not directly affect his goods. A parent is obliged to maintain his children ; but he is not obliged to apply this or that particular part of his substance to this purpose ; nor does he hold any of his goods upon condition, that he will maintain them. He has an absolute right in his good, and may sell them or give them away ; and when he has sold them, he may squander away the money ; nay at his death he may leave them from his children by will. If he has stripped himself of his goods in his life-time, or if, as may be the case, he had originally no goods ; the obligation to maintain his children would still be the same. It would not indeed operate in the same manner ; because, whilst we suppose him to have goods, this obligation will affect them indirectly ; those goods are then the readiest means, which he can make use of for the discharge of his personal duty : but after he has those means no longer in his power, he must still discharge that duty, as well as he can, by his labour, or by some other means. But if the obligation of the parent to maintain his children arises from his personal act ; if the right, which he has to his goods, is not the less absolute for his having children ; and lastly, if his obli-

gation is the same, whether he has any goods or not ; we may reasonably conclude, that the claim of the children to maintenance is upon the person of the parent and not upon his goods : and the consequence will be, that since they have no direct claim upon his goods, even during his life-time, their claim of maintenance can give them no right to his goods, after his death.

It is indeed very evident, that a parent ought to do the best that he can, for the welfare of his children ; and consequently, that he does not do his duty, if he suffers them, through any act or any neglect of his, to lose such goods, as he had in his disposal, and as he might have secured to them after his death. But this duty is of the imperfect sort ; the children have no strict right to the goods ; and what is done contrary to this duty and to their imperfect right will only be wrong and not void. However, when a parent dies possessed of goods, and without any just reason gives them away from his children, or causelessly disinherits them ; civil laws do well to interpose, and set that aside : not because the children had naturally a strict right to inherit ; for if they had, the will would be void of itself, without the interposition of any positive law ; but the law, having authority over the person of the parent does well to take care, that he shall in all respects discharge his duty, or to discharge it for him, where he has neglected it.

V. We have already seen, that the law of nature does not convey an intestate's goods to any particular person, but leaves them in common, and subjects them to the claim of the first occupant ; or that inheritance in intestate succession is not naturally incidental to property. ^b But it may be still questioned, whether inheritance has not been introduced and established by such

Inheritance does not arise from the general consent of all mankind.

^b Grot. *ibid*

a general consent of all mankind, as that which introduced and established property itself. In order to form a true judgment upon this question, it will by no means be sufficient to consider merely the claim, which the heir has to the goods of his ancestor, where both of them are members of the same community : because, though such heir, in all civilized nations, should be found regularly to claim the goods of such intestate ancestor ; yet it will be impossible to conclude from thence, that inheritance is established by any universal law arising from a general consent of all mankind. Each nation may have introduced inheritance amongst themselves, by their own particular consent, though all nations, as one great collective body of individuals, have not introduced such a claim amongst one another, by a general consent. To determine whether a claim of inheritance, though such claim prevails in all nations, was the effect of a general consent of all mankind, as one collective body, or of a particular consent of each nation for itself ; we must consider how this claim operates, or whether there is any such claim at all, when the two parties, the claimant and the ancestor, are members of different communities. For certainly a claim of inheritance will hold universally, and operate uniformly ; as well where these two parties are members of different communities, as where they are members of the same community ; if it was introduced by the general consent of all mankind, establishing an universal law for all, and not by the particular consent or appointment of each nation establishing laws for itself.

The method of introducing general property in land, by occupancy in the gross, will naturally prevent a stranger, that is, a person who is no member of the community, in which such property is vested, from inheriting by will ; and much more will it prevent him from inher-

riting by right of intestate succession. And where there is such a natural bar, the consent of mankind must be express, or at least the general use and practice of mankind must be very clear and uniform, before we can have any reason to conclude such bar to have been removed. But if on the contrary we find, as upon enquiry we should find, that in many, or rather in most, nations aliens or strangers are not allowed to inherit land; the conclusion must be, that inheritance, of land at least, is the effect of civil laws, and not of any positive law established by universal consent.

The property of individuals in moveable goods, as has been already observed, is more unlimited in respect of the disposal of it, than their property in land. But even such goods, in respect of inheritance, are accidentally subjected to the community, in whose territories, that is, upon whose land they are found: the claimants can by this accident be hindered from fetching them away, unless upon such terms, as the community has established. Now if all persons, who claim in an intestate succession, were to take such goods as these, according to the same rules, in the same order, and under the same limitations, in whatever territories these goods are found, whether within the territories, to which they themselves belong, or in any other whatsoever; such an uniform claim might lead one to suspect, that it had been introduced and established by the common consent of all mankind. But if, as the fact is, the rules, the order, and the limitations of succession to moveable goods, are determined by the civil laws of the community, within whose territories such goods are found; and the claimant must take them in such manner, as those laws appoint, which laws and which manner are different in different countries; the obvious conclusion from hence is, that the claim of

inheritance, being under the regulations of the civil law of each community, is not the effect of universal agreement, but of civil law only. Distinct communities, as having a general property in the land of their respective territories, seem to have agreed in this only, to take the advantage, which such general property gives them, of excluding all from the claim of inheritance, unless they are willing to derive this claim from the laws of the community, and to enjoy the benefit of it as an effect of those laws.

In the introduction of intestate successions a regard is had to a mans personal duty.

VI. As far as a man has a right to dispose of his goods by will, he has an opportunity of doing good to others, without any inconvenience to himself: and since it is every persons duty to do all the good he can; whoever does not take care at his death to give away what he has in his power, and can no longer enjoy himself, does not discharge his duty, so well as he ought. ^c If the law in introducing and establishing intestate succession proceeds upon the principle of doing a man's duty for him, where he has neglected it, of taking care to do that good for him, which he might have done himself, but has not done; we may trace out the persons, who, in successions established upon this principle, will naturally inherit an intestates goods, and may point out the order, in which the claims of those persons will take place. Though the right of inheriting is introduced and established by positive institution, yet this institution, like all others, will have a natural operation: and if we know the principle, upon which the institution proceeded, we may from thence be enabled to judge what its natural operation will be.

A man's children stand first in the succession.

VII. If the law introduced intestate inheritance merely with a view to the discharging a man's duty for him, where he had neglected to discharge it himself; the persons, to whom this principle will direct us, in

^c Grotius ibid.

the disposition of an intestates goods, are they, to whom he ought to have been kind. And the order in which such persons are to claim, will be determined, by the different degrees of kindness, which the intestate owed them.

^d The first duty of kindness, which a man owes, is to his children: he owes them the duty not only of maintaining them, but likewise of doing his best endeavours towards putting them into such a condition, as may make their life easy and comfortable to them. They are the principal objects of his regard, or have of all other persons the highest reason to expect his favour and bounty. Indeed, as he was the immediate cause of their coming into the world, it can scarce be looked upon as a matter of favour and bounty in him, to make them as happy as he can, whilst they continue in it: he might rather very justly be charged with cruelty, if he was to do otherwise. This then being the principal instance of kindness, that every person, who has children, is obliged to; their claim to inherit his goods, upon the principle already laid down, will stand first, if he dies intestate.

^e What we say of children, in the first degree of descent, may likewise be applied to those of the second or third degree, that is, to a man's grandchildren, or great-grandchildren. Where the immediate parent of such descendants is dead, and cannot inherit the goods of the grandfather or great-grandfather; the children, upon their remote parents dying intestate, inherit his goods; not only because they stand in the place of their father, who would have inherited, if he had been alive; but because it is the duty of the remote parent, as the remote cause of their existence, to shew them all the kindness in his power.

^d Grot. *ibid.* § IV. ^e Grot. *ibid.* § V. ^f Grot. *ibid.* § V.

Children
why pre-
ferred to
parents in
intestate
succeſſi-
ons.

VIII. * But ſuppoſe it ſhould happen, as it ſome-
times does, that a perſon, who dies inteſtate, ſhould leave
children, and that his parents likewise ſhould ſurvive
him. As he owed a duty to his children, ſo he owed a
duty to his parents: his gratitude for the kindneſs,
which he received from them in their bringing him
up, would oblige him to make ſome return of kindneſs
to them: it would in particular oblige him to provide
for them, as well as he could; if by age, or infirmity,
or any other accident, they were rendered incapable of
providing for themſelves. But then it is to be obſerved,
that there is a natural reaſon, why parents ſhould be
left out in an inteſtate ſucceſſion, at leaſt where the
eſtate is of antient inheritance. Such eſtates may come
to a man from ſome remoter relation by will; but
the uſual courſe of them is, that they come to him
from his parents. If therefore the rule for diſpoſing of
them, where a man dies inteſtate, will be moſt natural,
when it is moſt agreeable to the uſual courſe of ſuch
eſtates; ſince the general preſumption is, that they
came from his parents; the conſequence will be, that
in a general rule for diſpoſing of them, as his parents
cannot be ſuppoſed to be in exiſtence, ſo no regard can
be had to them. This rule may, by a reaſon taken
from the common courſe of nature, be extended ſo far
as to take no notice at all of a man's parents in any
inteſtate ſucceſſion, where he leaves children. In the
common courſe of nature a man's parents, eſpecially
if he has lived long enough to have children of his
own, do not uſually ſurvive him. If therefore his
parents are entirely left out of an inteſtate ſucceſſion,
where he leaves children, it may be upon a general per-
ſumption, that he has then no parents in being.

IX.^h When an intestate person leaves no children; we are, in the disposition of his goods, to consider, whether they came to him by inheritance, or were of his own acquisition. In either case a regard to his duty, considered as the principle, upon which the claim of inheritance was introduced, is to govern the succession and to point out who shall be his heir. Such goods, as came to him from his ancestors, laid him under an obligation of gratitude to them, from whom they came. If they descended from his father, the return of gratitude is due to him; if from his mother, it is due to her. And yet, though the duty, which governs the succession, immediately respects his parents; some reasons, already assigned will serve to shew us, why they should be excluded from inheriting in their own persons; if the inheritance is ordered by such general rules as the course of nature would suggest to us. There is a natural presumption, that a mans parents do not survive him; and though such estates, as we are now speaking of, might possibly have come to him by will from some other ancestor, and not from his immediate parents, yet the more usual descent, in estates of antient inheritance, is from the parents themselves. And since such general rules, as are to govern these successions, are to be taken from what is commonly the case; it follows that the parents of the intestate persons are very reasonably left out of the succession, where the estate to be disposed of is antient inheritance; upon account of the general presumption, that such estate came from the parents, and consequently that his parents do not survive him. As it is presumed therefore not to be in his power to pay the debt of gratitude to them in their own persons, he can only pay it to their representatives, that is, to those, whom his parents, if they had been liv-

The same principle governs the succession where an intestate leaves no children.

^h Grot. ibid. § IX.

ing, would have valued in the next place to themselves. These representatives are the children of his parents, or his own brothers and sisters. The duty of gratitude therefore, which he owed to his parents, for the estate of antient inheritance, received from them, will point out his brothers and sisters to be his heirs.

But suppose, that no brothers or sisters survive him, and consequently that it is not in his power to make a return to his parents in the persons of their representatives; we must then go another step backwards: the gratitude, which he owed to his ancestors, for the inheritance, descended from them, would lead him to his remoter parents, to his grandfathers or grandmothers. However as there is more reason to suppose them to be dead than his immediate parents, he could only shew his gratitude to these remoter parents in the persons of their representatives, who are his uncles or his aunts.

If there are no such representatives to take, in an intestate succession, the obligation of gratitude ceases; and estates of antient inheritance are disposed of in the same manner with estates of a mans own acquisition. And we are next to consider in what manner the principle of doing a mans duty for him will lead the law to dispose of such estates as these, when he dies without children.

^b What a man has acquired himself is not chargeable with any debt of gratitude, as it did not descend to him by the favour of any one. So that in these circumstances he has no other duty to regard: but that of kindness or good will in general. Now the ties of friendship are often much closer in a man's own opinion, than those of blood: we have often a stronger inclination to be kind to our friend, than to

^b Grotius, *ibid.* § X.

our relations. But as the connections of friendship are arbitrary and accidental, whilst those of blood are natural and uniform; the former cannot be reduced to the same rule or come under the same general notice, that the latter do. Upon this account, whatever arbitrary or accidental affections a man, whilst he was alive, may have had for his friend, the most natural presumption is, that he loved his relations better than any one else, and that he ought to have shewn his kindness and good-will to those in the first place, who were the nearest to him by blood. These therefore, upon the principle already laid down, have the first claim to inherit what estate he has acquired himself.

X. The law of Moses says, ⁱ “Thou shalt speak unto the children of Israel, saying, If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter: and if he have no daughter, then ye shall give his inheritance unto his brethren: and if he have no brethren, then ye shall give his inheritance unto his fathers brethren: and if his father have no brethren, then ye shall give his inheritance unto his kinsman, that is next to him of his family.”

Philo is mistaken in his interpretation of the Mosaic law.

Philo maintains, that this law of intestate succession does not exclude the intestate's father: ^k “for it would be senseless to imagine, that the uncle should be allowed to succeed the brothers son, as a near kinsman to his father, and yet the father himself be denied the same privilege. But since, as this writer goes on, the law of nature appoints, that children should be heirs to their parents, and not parents to their children, Moses passed this case over in silence, as ominous, and unlucky, and contrary to all pious wishes and desires: lest the father and mother should seem to be gainers by the untimely death of their children, when they ought rather to be afflicted at it. Yet by allowing the

ⁱ Num. XXVII. 8, 9. &c.

^k De vit. Mos, III. pag. 689.

inheritance to uncles, he indirectly admits the claim of the parents, in order both to preserve decency, and to prevent the estate from going to a stranger."

He here allows, that in the order of nature parents are excluded from succeeding to their children ; and this, one would think, is a sufficient defence of the law of Moses. He had however another point in view ; he did not so much design to defend the law, as to explain it for the benefit of parents, and to shew, that the law, though it does not name them, allows them to succeed to the estates of their children. But any one, who reads the passage here cited from the law of Moses, and compares it with what occurs in the same law upon the same subject, will find reason to think that the legislator has a particular view to estates of antient inheritance. And we have already seen that, the general presumption of such estates coming to a man from his parents is a sufficient ground for leaving the parents out of the succession.

There is one disposition made by this law of succession, which differs from the general rules, that have been mentioned above ; and that is the disposition of a mans inheritance to his sons, exclusive of his daughters ; so that his daughters have no claim, unless he dies without sons. This part of the law was relative to the civil polity of the Jews : and the intent of it was to obtain a purpose, which the legislator had in view, of maintaining an equality of fortune amongst the people, by keeping the same quantity of land, not only within the same tribe, but likewise within the same family. Now if the daughters had shared with the sons ; they by marrying into other families would have carried a great part of the inheritance out of their own. The law therefore postpones their claim, and only gives them a claim in case there are no sons.

And even then, though it cannot obtain its first intention of keeping the inheritance within the same family, it takes care to keep it within the same tribe, by enjoining, ¹ that such heiresses should marry to whom they think best, only to the family of the tribe of their father.

XI. Though the order of succession, which we have been describing, is called a natural one; yet it is not for that reason so fixed and settled, as to make it unnatural or unreasonable for civil laws to call the relations of an intestate to inherit his goods, in a different order. If this is a natural order at all, it is only so upon these two suppositions; first, that civil laws have established intestate inheritance; and secondly, that in such establishment they proceeded upon the sole principle of taking care to discharge a man's duties of kindness for him, where he had neglected to discharge them himself. But civil laws have commonly some other principles in view, besides this, such as are relative either to the civil polity of the state itself, or to the conditions, upon which the individuals hold their property. So that, notwithstanding the law may design in general to shew that kindness to an intestates relations, which he ought to have shewn them, by disposing of his fortunes amongst them, a regard to those other principles may lead it to dispense this kindness in a different order from what we have been describing. We have just now taken notice of an instance of this sort in the Mosaic law, which though it calls a man's children to inherit in preference to all others, as they are the persons, to whom he owed the chief regard; yet in view to the design of preserving the same lands in the same tribe, and as much as might be in the same family, it postpones the claim of the daughters, and gives them no share in the inheritance, where there are any sons.

Order of
succession
may be va-
ried by ci-
vil laws.

¹ Num. XXXVI: 6.

Upon the whole, as it is an argument of a shallow insight into matters of this sort, to charge the civil law of any country with being arbitrary and unreasonable, where in the order of intestate successions they deviate from such rules as would arise out of that natural affection, which every man is supposed to have for his relations, according to their nearness to him in blood; so on the other hand, no reasons, that can be assigned for such deviations, will be satisfactory, unless they are taken either from the particular civil constitution of the country, and the purposes, which such a civil constitution has in view, or else from the conditions, upon which every individual, who is a member of the civil community, is supposed to receive and to hold his property.

The succession of children may be cut off by disinheriton.

XII. ^m If a man by any public or solemn act has disinherited his children, in his life-time; this act will naturally prevent their claim to his goods, where he dies intestate. For his declared intentions concerning his property are in effect his will or testament: so that a child, thus disinherited, has no more claim to succeed to the estate of his parent, than he would have had, if such parent had expressly excluded him by will. Such an act of the parent in his life-time, or such a will made by him at his death, are contrary to the duty of a parent, if the child had not been guilty of any crime, which might deserve such usage. But if the parent had a full right to dispose of his goods, as he pleased; the act of disinheriton, though it is contrary to his duty, will not be void, without the interposition of the civil law. It is however, as we have before observed, very reasonable, that the civil law should interpose in these cases, and set aside his will, or make void his act of disinheriton, so as to dispose of his estate in such a manner, as he ought in duty to have disposed of it himself.

XIII. ⁿ There is a second exception against a child's succeeding to an intestate father; and that is, where proper evidence is wanting, that the person whose goods are in question, was its father. Because if there is not sufficient ground to presume, that the child is his own, it does not appear to have been his duty to provide for such child. Now the ground for presuming the child to be his own is, that it was born in marriage. For since by marriage the wife is placed under the inspection, and is in the custody, of her husband; it is reasonable to suppose, that he has kept all other men from her, and consequently that the children, which she bears, are his own. Nor does it appear, that where the law has established a right of inheritance, such children could claim in virtue of their father's acknowledging them by any public act, unless the same law had allowed of the validity of such acknowledgment. For instance, where adoption is allowed of, a man might as well adopt such children born out of marriage, as any other persons; and then the effect of his having adopted them would be, that they might inherit as his children. But where adoption is an act unknown to the law, an established right of inheritance extends to them only, to whom, in the eye of the law, the intestate owed a duty; and these are such only as are known, by the legal evidence of a marriage with their mother, to have been his children.

XIV. Now we are speaking of the claim, which children have, of succeeding to the estate of their intestate parent; it may be proper to enquire, how far such children, if they are infants, and how far infants in general, are capable of making a derivative acquisition of property. I say a derivative acquisition; because I suppose it to be evident, from what has been said already, that they cannot possibly make an origin-

Uncertainty of birth hinders a child from succeeding to an intestate parent.

al acquisition. And since the case of madmen and of idiots is nearly the same with that of infants, we may take this opportunity of considering how far any of them are capable of acquiring property derivatively. No derivative acquisition, as has been shewn already, can be made without the intention, design, or consent of the party, who makes it, and without some declaration or notification of such intention, either by words or by actions. But since there can be no such intention, and no such notification, where there is no use of reason; it follows, that infants, who are not yet come to the use of reason, that idiots, who never will arrive at it, and that madmen, who have lost it, are naturally incapable of acquiring property.

There is indeed one question relating to madmen, in which infants or idiots are not concerned. Infants cannot acquire property, whilst their natural incapacity continues, and idiots can never acquire it, as long as they live: we cannot therefore ask, whether they are capable of keeping or holding property, after they have acquired it. But since men, who were once of sound understanding and have passed their infancy, may lose their senses afterwards, and become mad; we may ask whether they, by thus losing the use of their reason, cease to have property in those goods, which they had before acquired. And certainly where the design of keeping property in goods ceases, where there is no intention of excluding others from the use or possession of them, the right of property is at an end: an intention to keep up this claim is as necessary to maintain it, as an intention to acquire such a claim is to begin it. But since this intention ceases with the use of reason; madmen by the law of nature are no more capable of keeping property, than they are of acquiring it.

XV. ° Grotius imagines, that infants, ideots, and madmen are made capable of accepting and of retaining property by the common consent of mankind, which considers them as parts of the human species; and by this fiction, that is, by considering them as part of the human species, they are looked upon to have so much reason, as will render them capable, like the rest of the species, to accept and to hold property. But then he observes, that though human laws, such for instance as what he calls the law of nations derived from the common consent of mankind, may suppose what is contrary to it. The right therefore of property in infants, or ideots, or madmen, as far as it depends upon such a law, can extend only to the acquisition and possession of things, but not to the use of them, or to the power of alienating them. Now it does not appear to me, that a supposition of their capacity to use or to alienate their property is at all more contrary to nature, than a supposition of their capacity to take and to retain it. Reason is as necessary in one of these acts, as it is in the other: he, that has not the use of reason cannot indeed alienate his property, but neither can he acquire property: and if it is contrary to nature to suppose him to have the use of reason for one purpose, it must be as contrary to nature to suppose him to have the use of it for the other purpose. Since therefore it is granted, that the common consent of mankind cannot, without going contrary to nature suppose infants, or ideots, or madmen, to have so much use of reason as to make them capable of using or of alienating their property, we may reasonably conclude, that neither is it any common consent proceeding upon this principle, which makes them capable of taking and holding it. Indeed an incapacity of using or of alienating is inconsistent with the notion

Infants,
ideots, and
madmen
naturally
incapable
of proper-
ty.

of property, unless we suppose that property to be a limited one: because full property in a thing implies a power of using it, and disposing of it, in what manner we please. If therefore both by the law of nature, and by this supposed fiction of the law of nations, infants, and ideots, and madmen are incapable of using and of alienating goods, they must be deemed equally incapable of having full property in them.

Law of
nations
wrongly
explained
by Gro-
tius.

XVI. It is obvious to ask here, what is meant, when we speak of the estate or the goods of infants, or ideots, or madmen? If they have no property in such estate or goods, why do we call them theirs? and since, if they have no property in the things so called, those things are either the property of no man, or, where inheritance has been established, are the property of the next heir, who is under no incapacity; the next question will be, why may not any one seize upon such estate, as being become common; or however why may not the next heir consider it as his own, if there is any such heir? Certainly this might be done, if no positive law interposed to hinder both the next heir in succession from entering in his own right, and to hinder all others persons from seizing upon such things, as would belong to an infant, or ideot, or madmen, if they were capable of property. But then these laws do not interpose by a fiction, that infants or ideots or madmen, as parts of the humane species are capable of acquiring and holding property; they interpose by taking those things into their custody, or by guarding them for the benefit of him, who would be the owner of them, if he was capable of property. And thus all other persons are prevented from making any acquisition of them, not in virtue of any supposed exclusive right in him, but merely by the authority and prohibition of such law.

In the mean time the things are called his, not because they are so, but because the effect of the law in respect of all other persons is the same with the effect of an exclusive right in him. I say in respect of all other persons; for in respect of himself the effect is not the same: an exclusive right of property either real or supposed would give him the power not only of keeping, but likewise of using or of alienating his goods; whereas the mere custody of the law, though it hinders others from seizing upon them, does not produce any such power in the person, for whom they are kept.

When things are thus kept for the benefit of infants, they are in the custody of the law, till those infants arrive at the use of reason, and then their property begins. When they are kept in the same manner for the benefit of madmen, the custody is precarious and temporary: for since madmen are frequently known to recover the use of their reason, and are therefore always deemed capable of recovering it, their property can be in the guardianship of the law only till this event happens; and since it is uncertain at what time it will happen, the custody of their property is precarious. But when things are kept for the benefit of ideots, the custody is perpetual, that is, it lasts as long as the ideot lives: because ideots are such, as never had and never can have the use of reason.

C H A P. VIII.

Of Prescription.

- I. *What Prescription is, and on what founded.* II. *Why long possession is necessary to claim by prescription.* III. *Why uninterrupted possession is necessary.* IV. *Why honest possession is necessary.* V. *Prescription extends to incorporeal things.* VI. *Objection to the natural foundation of prescription.* VII. *Some grounds to believe prescription to have been established by an universal consent.* VIII. *What length of time gives an equitable claim by prescription.* IX. *Prescription holds against persons unborn.*

What prescription is, and on what founded.

I. **P**RESCRIPTION is a right to a thing acquired by long, honest, and uninterrupted possession; though before such possession some other person and not the possessor was the owner of it.

^a This right in the possessor is founded upon the presumed dereliction of the proprietor. It is not indeed agreeable to the law of nature, that any moral effect, such for instance as the loss or the acquisition of a right, should follow upon the bare intention of the mind: but when the intention either of parting with, or of acquiring a right is sufficiently declared, it is natural, that such an intention should produce its effect.

Now our intentions may be made known either by words or acts. We may indeed falsify in our words, or we may dissemble in our behaviour: it is possible, that we may say one thing, when we mean another,

^a Grot, L. II. C. VI. § I, II, III, IV, V.

or that we may behave in such a manner as to deceive mankind, and make them believe our designs to be different from what they are. There is therefore no strict and necessary connection between our intentions and the signs, whereby we testify them. It must however be allowed, that our acts may be as certain marks of our intention, as our words ; which is all we need contend for. Thus we may release a debtor, not only by a verbal declaration, but by delivering up or by cancelling his bond : and in like manner what we throw away is as plainly relinquished, as if we had declared our design to relinquish it in so many words.

The acts, by which we may notify our intentions, are either positive or negative ; that is, our intentions may appear either from our actions or our omissions.

^b When any thing is transacted, in which a man is concerned, if he is present at the time, and does not contradict it ; the presumption from his silence is, that he consents to it. If goods are shipwrecked, or cattle have strayed, and the owner neither sends out to look for them, nor endeavours by any means to recover them, the most obvious construction of his neglect is, that he despairs of finding them, and disregards or gives up any claim, that he had to them. In like manner, if he suffers another to keep possession of his goods, without laying claim to them, when he both knows where they are, and is at liberty to claim them, this neglect is fairly presumed to be a mark of his intention to part with them : and when the owner has thus relinquished them, they become the property of the possessor, as the first occupant of them.

It is necessary however to remember that in this, and in all other instances, where a man's neglect to claim is deemed a mark of his intention to relinquish his goods, it is requisite that his silence should not arise

^b Num. XXX. 4. 11.

either from ignorance or from fear. If he does not claim his goods, either because he does not know what are his goods or who is in possession of them, or because he is under some restraint and is afraid to claim them; his silence in such circumstances can be no mark of his intention to part with them: such silence plainly arises from another cause, and therefore necessarily requires another construction.

Why long
possession
necessary
to claim
by pre-
scription.

II. From what has been said it will appear, that prescription cannot proceed but upon long possession, not because length of time operates as an efficient cause to produce a right in the possessor; but because it is necessary in order to make the owners silence a reasonable ground to presume, that he intends to relinquish his property. If his neglect is of short continuance, it may be owing either to his ignorance or his fear: he might not know what things he had a right to, or he might not know who was in possession of them; or if he knew both these particulars, yet still he might be afraid to make his claim. But in the course of a long time, it is reasonable to imagine, that he might have come to the knowledge both of his claims, and of the person who is in possession of what belongs to him, and that he might likewise by some means or other be able to remove his fears, or at least to find some opportunity of declaring his right without any danger. Length of time therefore determines his silence or neglect to be a mark of his intention to relinquish his right; as it affords a reasonable presumption, that such silence or neglect was not owing either to ignorance or to fear.

Why un-
interrupt-
ed posses-
sion neces-
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claim by
prescrip-
tion.

III. Uninterrupted possession is plainly necessary to give the possessor a right by prescription; because his right depends upon the presumptive dereliction of the owner; and there can be no presumption of his having relinquished, where by any claim of his he has interrupted the possession.

IV. It is to be farther observed, that prescription cannot proceed without honest possession. If the possessor came dishonestly by the goods, though his possession is ever so long or ever so quiet, he acquires no claim to them. We may several ways become honestly possessed of what belongs to another man, without having any right to it, when we are first possessed of it. Suppose, for instance, that the thing has been given us by any one, who was not the true owner of it, though we thought he was; suppose we have purchased it of any one, who had obtained it by force or by fraud, without our knowing how he obtained it; or suppose we have found it, and have endeavoured without success to find out the true owner; in any of these cases our possession is honest, though the thing possessed is not our own. Where possession of a thing begins after such a manner as this, without any dishonesty in the possessor, and has been continued for a considerable length of time without being interrupted, it will give him a right to the thing. But if his possession was dishonest in the first instance, he can acquire no such right. All dishonest possession implies, that some fraud or some violence was made use of in obtaining it. Where fraud is made use of, the owner is certainly ignorant of something, which he ought to know; and where violence is made use of, the owner is certainly in some fear. Now length of time affords only a presumption, that the ignorance or fear of the owner are removed: and consequently, since no presumption can prevail against a certainty, no length of time can so far take away the ignorance or the fear of the owner, in the case of dishonest possession, as to render his silence a sufficient sign of his intention to quit his claim. As his ignorance or his fear were certain at first, the same ignorance

Why honest possession necessary to claim by prescription.

or the same fear must be supposed to continue till they are certainly removed. Length of time affords only a presumption, that they are removed. Therefore length of time does not remove them sufficiently. But since as long as his silence is understood to arise either from ignorance or from fear, it cannot reasonably be looked upon as a sign of his intention to relinquish his right, and upon that account the right of the possessor cannot take place ; it follows, that no possession though for a great length of time and without interruption, can give a right by prescription, if it began dishonestly.

Prescription extends to incorporeal things.

V. When we say, that things may be acquired by prescription, we must be understood to mean, not only corporeal, but likewise incorporeal things. Jurisdiction or sovereignty may be acquired in this manner, as well as land or moveable goods. Laws may be repealed ; customs may be established into laws ; civil constitutions of government may be altered ; subjects may enlarge their privileges ; governors may extend their prerogative ; not only by express appointment or compact, but likewise by such a tacit agreement as this of prescription. But it is not necessary to enter into this matter now ; because there will be a more proper opportunity, when we come to explain the law of nature, as it respects civil societies.

Objection to the natural foundation of prescription.

VI. The principle, upon which the claim of prescription is founded, according to the law of nature, as far as we have yet explained it is only presumption or conjecture. ° The owner of the thing, which the present possessor claims, is presumed to have quitted his right to it, merely because he has been silent about it, and has neglected to claim it for a long time. Mankind indeed might by common consent establish such a silence into a standing mark of an intention to relinquish, in the same manner as, by a like common

consent, they have affixed a certain and determinate signification to words, which in themselves, without such consent and establishment, have no signification at all. But without an establishment or consent of this kind, the owners silence alone, though of ever so long a continuance, would be too precarious a mark of his intention to relinquish his right for any certain and uniform claim of the possessor to be founded upon it. Mankind, as far as we can learn what their inclination is by constant experience, are generally disposed to keep what they have gotten, and not to relinquish it, without good and sufficient reasons for so doing. Any neglect therefore to claim what is their own, if we would interpret it agreeably to the nature of mankind, as we learn from constant experience what that nature is, cannot well be looked upon as a mark of their intention to relinquish their right; unless some other good and sufficient reasons appear, why they should relinquish it: their general temper and inclination will rather lead us to suppose, that such neglect or silence may have been owing to ignorance or fear.

To support the right of prescription upon natural principles, it is sometimes explained in a different manner. This right is said not to take place, till a man has been in possession of the thing claimed for time immemorial, and that as no other proprietor can then appear, besides the present possessor, he alone is to be looked upon as the true proprietor: because a claimant, who does not appear, and a claimant, who does not exist, are in a moral view the same thing. Now if by time immemorial is here meant, such a length of time, that no memory can possibly go farther back; the possessor of the thing must, after such time immemorial, be undoubtedly the proprietor of it: but then he cannot well be said to have a right

to it by prescription; because his right, upon this supposition, will not differ at all from a right by first occupancy. For certainly where there neither are nor can be any traces of any other owner, besides himself; he must necessarily be looked upon as the first owner. But if by time immemorial any time less than this is meant; if there are any traces of a former owner, though such former owner has not claimed for many years; it will be as difficult, upon this principle of possession for time immemorial, to make out the possessors right to the thing so possessed, as upon any other, without having recourse to some positive establishment.

Some grounds to believe prescription to have been established by an universal law.

VII. The circumstances of mankind after the introduction of property, and after possession had been long lost by the old proprietor, and had long continued in some other person, would make such a claim as this of prescription, generally beneficial. For without such a claim, the difficulty of ascertaining the right of either party would be the occasion of endless disputes and of great hardships. Disputes arising, after possession on one side had been many years uninterrupted, could not easily be decided with fairness and honesty: because it would be difficult either for the successor or the other claimant to clear up their title. And it would be a hardship to turn the possessor out of what he had quietly enjoyed, till it was in a manner grown to his patrimony; especially since the former proprietor cannot in general be supposed to want it much, as he had been able to live so long without it, and to provide for himself by some other means. The usefulness of a claim is indeed no proof, that such claim has in fact been established. To prove this we must have recourse to the common opinion of mankind, as it appears in their constant practice. And since, when we

look into their practice, we find, that not only such persons, as are members of the same civil society, but those likewise, who belong to different communities, plead prescription against one another; nay since we find that when one nation has been long possessed of what did formerly belong to some other nation, the possessor maintains his right to the thing by a like plea; and that such a plea, if it can be well supported, is generally allowed to be a good one; we have reason to conclude, that the claim of prescription has been introduced and established by a like common consent with that, which introduced and established the claim of property. But because prescription is a sort of limitation or exception in the right of property; it is necessary to look a little farther than the bare establishment of such a right in order to see how we can reconcile it with the claim of property. And it is in this part of the question, that we have recourse to the principles already explained, to the presumption, that he who is silent for any great length of time and does not claim his right, is disposed to relinquish it.

VIII. It may perhaps, without some express appointment, be difficult to determine for what length of time a person must be in possession of a thing, to give him a claim to it by prescription. The foundation of this claim, as we have already explained it, will shew us, that the time must be long enough for presuming, the former owner of the thing was not hindered from putting in his claim either by ignorance or by fear, but must have had frequent opportunities of knowing both what his right is, and who was in possession of it, and frequent opportunities likewise of releasing himself from any restraints, which might have forced him against his will to be silent as to his claim. Possession however for time immemorial, if the meaning of the words is

What length of time gives an equitable claim by prescription.

rightly explained, seems to be the most equitable time of possession for acquiring a prescriptive right.

The most obvious meaning of time immemorial is a time of such duration, that the memory of no man living can of itself, when unassisted by any external evidences, go back beyond it. A possession of no longer continuance than this would give a right by prescription too soon: because by the help of written evidences, the memory of man is assisted to go back into such periods of time, as have been long past; and such evidences will frequently shew where the possession of the former owner ceased, and by what means the claimant by prescription got possession at first and continued it afterwards. But then on the other hand, if by possession for time immemorial we mean nothing less than so long a possession, that not only the unassisted memory of persons now living cannot go farther backwards, but likewise, that no written evidences, no memory assisted by the ordinary method of recording facts, which are past, can make out any traces of any other proprietor, besides the present possessor; the claim of prescription would then be useless, and would not differ at all from the claim of first occupancy. For where would be the use of it, if there was no other claimant besides the present possessor? and what other claimant could there be, if there were no traces at all to be found of any right in any other person besides himself? He would upon this supposition have an indisputable title to the thing, which he possesses, as the first occupant of it; because he appears to be the only owner, that it ever had.

There is however a middle sense of time immemorial. If we understand it to mean so long a time, that though a former owner may be able to make out some sort of title, yet he cannot either by the memory of

any person now living, or by any record of past facts, make out a clear and undoubted title to the thing in question; possession, for such a length of time as this, may fairly determine the thing to belong to the present possessor. A prescription gained by possession for a time thus limited, will be different, as it ought to be, from a right of first occupancy; and it will likewise be of benefit to mankind by deciding controversies, not easily to be decided otherwise, without taking place so soon, as to be in danger of barring the claim of the true owner. Its use consists in barring a doubtful right; and its equity is preserved by a proper regard to all such rights as can be made out by the memory of man, when assisted by written evidences.

IX. What we claim by prescription, or in consequence of our having been possessed of it without interruption for time immemorial, must commonly have been in possession either of ourselves or our ancestors for a longer time, than the extent of any one persons life. So that prescription must most frequently be pleaded, not so much against the former owner, as against his heirs. Now for great part of the time, whilst this possession lasted, those heirs were not in being: they were not born, when our own possession began, and possibly were not born, when our ancestors possession had continued long enough to give a prescriptive right. ^p Shall we allow therefore, that the claim of the ancestor, which was set aside by our long possession, will revive again in the person of the heir? If we allow this, prescription will be of little use: it will only serve to lay a dispute asleep for a while, but will suffer it to revive hereafter, when the question concerning the respective claims of the former owner and of the present possessor will have become

Prescription holds against persons unborn.

^p Grot. *ibid.* § IX.

more intricate, in proportion as we are farther removed from the original evidence, by which that dispute might have been settled. Shall we therefore, on the other hand, affirm, that a prescriptive right will bar the claim not only of him, who first lost possession, but of them likewise, who are descended from him, and were not born at the time, when such prescription was going on and began to take place? Before we affirm this, we should consider by whose silence or neglect the right of property is lost. If it is lost by the silence of the heirs, who were unborn, a prescriptive right would have no foundation in reason, that might reconcile it with the notion of property. It is absurd to construe the silence of those, who were unborn, as a mark of their intention to relinquish their rights: because their silence will not only bear, but requires another construction; they were therefore silent and did not claim, because they were not born, and could not claim. But if we maintain, that they, who were unborn, lost their right, not by their own silence or neglect, but by the silence or neglect of their ancestors; prescription against them seems to be founded in injustice; it is an injury to deprive them of what belongs to them, for the neglect of their ancestors, a neglect, in which they were no way concerned.

What shall we say therefore? Shall we take away the benefit of prescription by allowing, that it does not hold good against the posterity of the former owner? or shall we, on the other hand, maintain, that it does hold good against his posterity, as well as against himself, and so either make the claim absurd, by saying, that the silence of his posterity, when they could not speak, is a mark of their intention to relinquish their right; or else shall we make it unjust by saying, that they forfeit their right by the neglect of their ancestor?

The truth is, that prescription holds good, not only against the ancestor, but against his posterity; not from their neglect, who were unborn, but from the neglect of those, who went before them. And by taking this part, we have only the justice of such a claim by prescription to defend. It will be no very difficult matter to defend this part of the alternative, where inheritance has never been established: because the descendants of a man can have no injury done them in being kept out from inheriting what they had no right to inherit. But suppose a general right of inheritance to have been established; yet still the claim of prescription will stand clear of injustice. No injury can be done to a person, where no right is taken from him. But the posterity of a man, who loses his claim by the prescription of another, are not deprived of any right. Before they were born, they had no right at all: for as things, which are not in existence, have no natural qualities, so persons, who are not in existence, have no moral qualities; and amongst other moral qualities, they have no rights. If then the thing in question was lost by their ancestor, before they were born, no right is taken from them by their being barred from claiming what he had so lost: because they have no right to inherit any thing from him, which is not his own at the time of his death; and whatever he has lost by long neglect, and another has acquired by long possession, has ceased to be his own. No injury was done to them, whilst the claim was acquiring; because then they had no right in the thing, if they were not in existence, and lost that right by their own silence, if they were in existence. And no injury is done to them by the possessor, after the claim is acquired, if he still keeps the thing; because it then belongs to him, and not to them; since they can have no pretence to inherit, from their ancestor, what such ancestor himself had no right to at the time of his death.

C H A P. IX.

Of the Obligations arising from Property.

- I. *Property of one man obliges others not to hinder him in enjoying what is his own.* II. *The right of property produces an obligation to restitution.* III. *The natural fruits or advantages of another's property are to be restored.* IV. *Honest possessor not obliged to damage himself by restitution.* V. *No obligation to restitution where the thing has perished.* VI. *Obligation to restitution does not extend to all advantages made by the possessor.* VII. *No obligation to restitution of fruits neglected.* VIII. *Or where a thing given is given away again.* IX. *Or to restore the overplus of price where a thing bought is sold again.* X. *Restitution to be made without reimbursement.* XI. *Goods to be restored and not returned to the seller.*

Property
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I. **T**HE first and most obvious obligation, that we are under, towards any person upon account of his property in a thing either moveable or immoveable, is to suffer him quietly to enjoy it, and to dispose of it, in what manner he pleases, without attempting by force or by fraud, either to take it from him, or in any respect to make it worse. This obligation plainly arises out of the notion of property: for his right to exclude us from meddling at all with a thing would have no effect, or would be in reality no right; if we, notwithstanding such right, were at liberty to take the thing away from him,

him, or to hinder him in the use and enjoyment of it, or by any means to impair and waste it.

II. ^a As the right of property, which any person has in a thing, obliges us not to take that thing from him dishonestly ; so it obliges us to restore it to him, or not to keep it from him, when we have, even by any honest means gotten it in our possession. When without any knowledge of the truth or any bad design on our part, a thing is given us, which belonged to some other person and not to the giver ; when we purchase what some one else, and not the seller, had a right in ; when we find a thing, the owner of which is not known, at the time of finding it ; in such cases as those our possession of the thing is honest ; till we have found out the proprietor : but as soon as we have found him we are obliged in virtue of his property, to restore the thing to him. For if we knowingly and designedly keep him out of what he has a right to, we do him the same harm, and consequently are guilty of the same injustice as if we had taken it from him.

The right of property produces an obligation to restitution.

III. From this obligation to restore any persons property, when it is in our hands, another obligation is derived, an obligation to restore the natural fruits produce or advantages, which have arisen from it, whilst we were in possession of it : because the natural produce of a thing, and all the natural advantages rising from it belong as much to the proprietor, as the thing itself. But it will be necessary, in determining questions of this sort, to distinguish between the fruits, which come from the thing itself, and those, which are produced by the labour and at the expence of the occupier. The former are what I call its natural produce ; and of these only we speak, when we maintain, that there is the same obligation to restore the fruits of a thing, as to restore the thing itself : for certainly my property in a

The natural fruits or advantages of another's property are to be restored.

^a Grotius, Lib. II, Cap. X, § 1. II.

thing can never give me a right to another persons labour. Suppose the thing possessed to be common field land, which produces nothing, unless it is manured, tilled, and sowed : if the honest possessor has a crop of corn upon the ground, at the time of discovering the true owner ; he would be under no obligation of restitution as to the corn ; because it was produced by his labour and at his expence : the corn is not the natural produce of the thing, which the other has a right to. But if it was a meadow with a crop of grass upon it, the possessor could have no claim to the grass ; it is part of the meadow itself, or is the natural produce of it, and consequently belongs to the owner of the thing, and is not due to the labour of the possessor. In like manner the young of cattle, as they are their natural fruit or produce, belong to the owner of the cattle, and are to be restored to him. If the fire belongs to one of the parties and the dam to the other ; the young naturally belong to the owner of the dam, after a very small satisfaction is made to the owner of the fire. For though the fire contributed to the production of the young, yet numberless accidents might have happened, after his act was over, to hinder the production. His owner therefore has no right to more, than what the chance, that young would be produced, was worth, at the time of his act.

Honest
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IV. As the obligation to make restitution, which we have been speaking of, guards against any injury, that might be done to the owner of a thing ; so it is reasonable, that such limitations should be fixed to this obligation, as will guard the honest possessor from suffering any injury. The general limitation is, that the possessor is not obliged to suffer any loss, in what he has a right to, by making restitution. For since the owner's claim extends no farther than his property, the obligation of the possessor can extend no farther.

From hence it appears ; First, that if the true owner cannot be put into possession without some expence, the honest possessor is not obliged to be at that expence : nor is he obliged to be at any more trouble in making restitution, than he is paid for ; because the other has no more right to his labour, than to his money.

Secondly, if the possessor has made any improvement in the thing, whilst he supposed it to be his own, he has a natural right to be paid for his labour and materials. Thus if he has built a house upon ground, which he was honestly possessed of, the proprietor, as his claim reaches only to the ground, can have no natural right to the house, so as to hinder the other from pulling it down, unless he pays for the materials and workmanship.

Thirdly ; though, as we have seen already, grass, whilst it is growing, is the natural produce of the land, yet if it has been cut and made into hay, the honest possessor's labour is joined to it, and he has, as in this instance, so in all others of the same sort, a natural right to be paid for his labour in collecting what is in itself the fruit of the thing possessed. But then this labour is all, that he ought to be paid for : and however it might be urged, that the fruits would have been spoiled, and consequently would have been worth nothing, if he had not collected them ; this will give him no right to the fruits themselves. For suppose, which is the strongest light the case can be put in, that the value of the labour is vastly greater, than the value of the fruits ; yet it cannot upon this account so over-rule the claim of the proprietor, as to set it aside : since no satisfactory reason can be given, why, by joining a more valuable right of mine to a less valuable right of another man, the whole should be made my own.

No obligation to restitution where the thing has perished.

V. Grotius under this head has explained some particular cases relating to the honest possessors obligation to make restitution. Some of these cases have been considered already; others do not belong to this head, and shall be considered in their proper places; the rest are these which follow; ^r First, if the goods, of whatever sort they are, and the natural fruits of them too, have so perished in the hands of the honest possessor, that no part of them remains, and no advantage has been made of them; he is under no obligation to make restitution merely because such goods and the fruits of them have passed through his hands. For since the proprietors claim is a claim upon the thing only, and not upon the person, the obligation of the possessor extends only to the thing; and consequently if this and the fruits of it are not in being, the person of the possessor is not chargeable.

Obligation to restitution does not extend to all advantage made by the possessor.

VI. Secondly; ^s Grotius affirms in general, that if the possessor is at all richer by having had the property of another man in his hands, all the advantage, which he has made, be it of what sort it will, is due to the proprietor: in particular, if the goods or the natural produce of them are consumeable, and the possessor has made use of them, he is bound to restore the value of them, provided he must have used as much of his own goods, if he had not been in possession of these: because, says our author, he has in this respect been a gainer by the others property. Now of this there is some reason to doubt. For since the proprietor has a claim upon the thing only and not upon the person, his claim must be at an end, when the thing is no more: as such claim does not extend to the person of the possessor, there is no way, by which it should charge any part of his property with the obligation to restitution. In the case of dishonest possession,

^r Grot. *ibid.* § III.

^s *ibid.* § II, V.

as will be shewn hereafter, we should have reason to determine otherwise: for there the dishonest act of the possessor lays an obligation upon his person to make restitution; the proprietor, as he has a right to the thing in virtue of his own property, so has he likewise a demand upon the possessor, on account of his crime.

VII. Thirdly; * the honest possessor is not obliged to make restitution for the natural produce of the thing, where such natural produce has perished through his neglect to collect it. For here the fruits or produce, which are the thing in question, are not in existence; and consequently the claim of the proprietor, which, in case of honest possession, is a claim to the thing only, must be at an end.

No obligation to restitution of fruits neglected.

VIII. Fourthly; if the thing was given to the possessor, and he gives it away again, he is not obliged to restitution. Unless, says ^u Grotius, it appears, that he would have given away as much in value out of his own substance, if such thing had not been in his hands: because, in this case, he will have been a savor or, in fact, a gainer by the others property. But here again our author has not applied the necessary distinction between a claim upon the thing and a claim upon the person. And since, where the possession is honest, there is no claim upon the person of the possessor, the proprietors claim can extend no farther than to the thing, which belongs to him.

No obligation where a thing given is given away again.

IX. Fifthly; there is the same objection against the determination of ^w Grotius, that if the possessor bought the thing, and then sold it again for more than he gave for it, the proprietor has a right to the difference. The price, which the thing was sold for, is not the thing itself, and consequently is not the object of the proprietors right: so that his claim cannot reach it, unless that claim affected the person of the possessor.

No obligation to restore the overplus of price, where a thing bought is sold again.

* Grot. *ibid.* § VI.

^u *ibid.* § VII.

ibid. § VII.

Restitu-
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X. Sixthly; the honest possessor, though he purchased the thing at a considerable expence, is bound to restore it, and cannot require the proprietor to reimburse him. * If the possessor could demand this, the owners right of property would be nothing: since there is no value in a right, which a man must pay for, before he can assert it. But we may add one exception to this rule, which is, that if the thing was in such hands before, that the owner could not have recovered possession, without some expence and trouble; actual possession is then a valuable consideration to him, and the honest possessor, from whom he receives his goods, may expect an allowance for it. Thus suppose the goods to have been purchased of thieves or pirates; or suppose them to have been found, when the owner had but little reason to expect, that he should ever recover them; the honest possessor may demand salvage: because the right of the proprietor, when it was so likely to be quite lost, is not to be valued to the full worth of it: the difference between its full worth, and the worth which he would have reckoned it of to him, when he was in so much danger of losing it, is due to the honest possessor, by whom it is saved.

Goods to
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XI. Seventhly; y he, who buys another man's good of persons, who have no right to sell them, cannot return them upon the hands of the sellers, in order to recover his money again: because, as soon as they were in his power, his obligation to restore them to the true owner took place. Indeed, if he had discovered, that the goods did not belong to the seller, before he had completed his bargain, he would not be obliged to complete it, for the sake of being able to return them to the true owner: for no man can be bound in justice to part with his own money, merely that another may recover his right.

* Grot. *ibid.* § IX.

Grotius *ibid.* § X.

C H A P. X.

Of the Right which a Man has in his own Person.

- I. *Right over persons reduceable to a right to do certain actions.* II. *What is meant by a right to our liberty.* III. *Law of nature the only original restraint upon a mans power of acting.* IV. *Liberty not unalienable.* V. *Restraints upon liberty by the law of nature are of three sorts.* VI. *Duty to God.* VII. *Duty to mankind.* VIII. *Several instances of a right in our own person.* IX. *Duty to ourselves.*

I. **I**N the general definition of right, we have only taken notice of a right to possess certain things, or to do certain actions. Our rights over persons are not particularly mentioned in that definition; because they are in effect only rights to do certain actions. Thus the right, which we have over others, is a right to command or direct them; and one of the principal rights, which we have over ourselves is a right to act as we please.

In some respects indeed the right, which a man has in his own person, may perhaps more properly be reduced to a right in a thing: of this sort are the rights, which he has to his limbs, to his health, to his life.

II. By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a man's right over his own actions. In the common way of speaking every man is said to have a right to his liberty: but this expression is not so accurate, as it might be. For since the

Right over persons reduceable to a right to do certain actions.

What is meant by a right to our liberty.

notion of a persons liberty consists in having a right over his own actions; to say, that he has a right to his liberty, is in effect to say, that he has a right to a right over his own actions. However I shall neither quarrel with the expression, nor scruple to use it, as I have occasion; since custom has established it to import what is self-evidently true, that every man has an independent power to act as he thinks fit, where he is under no restraint of law.

Though liberty in the physical sense of it, is an independent power of acting, yet when we consider it in a moral view, our notion of it is less extensive. For if our nature and constitution, the circumstances that we are placed in, and the authority, which our Creator has over us, oblige us to act in a particular manner; then, as far we are under such obligations, we have not an independent power of acting, as we please. Upon this account, in defining the word liberty, I have called it the power, which a man has, to act as he thinks fit, where no law restrains him. It may perhaps be difficult to prove, that man has physically an independent power of acting: but the difficulty does not arise from any uncertainty in the fact, but from the evidence of it: nothing being so difficult to prove as a self-evident proposition. If any one therefore doubts whether he has such a power, instead of attempting any formal proof of it, the best way is to refer him to his own experience for conviction.

The law of nature the only original restraint upon a man's power of acting.

III. The only restraint, which a man's right over his own actions is originally under, is the obligation of governing himself by the law of nature, and the law of God. Whatever right those of our own species may have over us, either to direct our actions to certain purposes, or to restrain them within certain bounds, beyond what the law of nature has prescribed, arises

from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them. Till this is done, they have no claim of superiority over us: nature has made no difference between one man and another: all, who are of full age, have reason of their own to direct them, and a will of their own to choose for themselves. And though, as men may differ from one another in the capacities of judging what is best to be done, it may be the safest way to take the advice of those, who have more skill than ourselves; yet this is matter of prudence only, and not matter of duty. Our reason and our will belong as much to us, as their reason and their will belong to them: we must therefore naturally be as independent of them in directing our own actions, and in choosing for ourselves, as they are of us. I would not be understood to mean, that no man has a right to force us in any respect, till we have given him such a right by our own consent: for it will appear hereafter, that in many respects men have a right to force us to comply with the law of nature. But such a right as this implies no natural superiority in them; since in the like instances we have the same right to force them, that they have to force us.

IV. There cannot well be any question, whether our liberty is alienable; at least it is a question, which must at first sight be determined in the affirmative; unless some law can be produced, which forbids us to alienate it: because all our rights are alienable, as far as it is not contrary to any law for us to part with them. In fact we find, that in many instances our liberty is alienated, and no one questions whether it could be alienated or not: for certainly the obligations of promises and of contracts, where we bind ourselves to do

Liberty
not unalienable.

what the law of nature would otherwise not have required of us, are wholly unintelligible, upon supposition, that our liberty is the same, after we have made such promises or contracts, that it was before.

It may be said perhaps, that no man can absolutely and without reserve, renounce his liberty, and transfer the full right of directing his actions to any one else : because this would be plainly throwing himself into a necessity of doing wrong, whenever the person, to whom he has thus subjected himself, shall think proper to command him. But the whole amount of this objection is, that no man can renounce or transfer a liberty, which he never had. He has indeed a physical power of doing wrong ; but his liberty in a moral sense is a power of acting as he pleases, where the law does not restrain him ; he has not therefore the liberty of doing wrong, and consequently cannot transfer to any one the power of forcing him to do wrong ; not because liberty is in itself an unalienable right, but because no man can transfer to another a right, which he never had himself.

The re-
straints
upon li-
berty by
the law of
nature are
of three
sorts.

V. In order to understand how far our liberty extends, or how far we have a right to act, as we please, by the law of nature, previously to any obligations, under which we may have laid ourselves by any particular compact or agreement of our own ; it will be necessary to consider what restraints that law has laid us under, in respect of God, in respect of mankind, and in respect of ourselves.

Duty to-
wards
God.

VI. We are obliged to obey the will of God, as far as we are able to discover it ; because he is the sovereign Lord of the universe, who made and governs all things by his almighty power, and infinite wisdom, to whom we are indebted for all the happiness, that we enjoy at present, and upon whom

we depend for all the happiness, that we expect hereafter. By the nature and constitution of things he is our superior : so that the right, which we have in our own persons, particularly our liberty, or the right of acting, as we think fit, is subject to his authority, and is limited by all the restraints, which he is pleased to lay upon us.

From this account of the obligation, that we are under to obey the will of God, the other parts of our duty towards him may be easily collected. The general name of this duty is piety, which consists partly in entertaining just opinions concerning him, and partly in such affections towards him, and such worship of him, as is suitable to these opinions.

It is the business of natural theology to demonstrate the existence and the perfections of God, to prove that there is an eternal omnipresent Being, of infinite power, wisdom, and goodness, who made and contrived the universe at first, and who still continues to govern and direct it. Where we have sufficient opportunities of informing ourselves rightly concerning the existence and the perfections of God ; it is our duty to make use of these informations. We cannot obey his will at all, unless we believe that he is ; and we cannot obey it as we ought to do, unless we have acquainted ourselves, as perfectly as we are able, with his nature and attributes. If therefore we are obliged to obey his will, we must for the same reasons be obliged likewise to form true notions and to entertain just sentiments concerning him ; to believe his existence and perfections ; to admire his wisdom ; to adore his goodness ; to reverence his power ; to acknowledge our dependence upon him ; and to honour him, in all our thoughts, and words, and actions, as our maker, preserver, and governor.

From hence it follows, first, that atheism, which consists in a disbelief of his existence, secondly, that blasphemy, which consists in attributing to God such imperfections, as are inconsistent with his nature, and thirdly, that profaneness, which consists in a wanton or disrespectful treatment of his nature and attributes, are all of them contrary to the law of nature.

But though we believe, that there is a God, and have formed true opinions, and entertain just sentiments of his nature and attributes; yet certainly we have not discharged the whole of our duty towards him, merely by avoiding atheism, blasphemy, and profaneness. By avoiding these crimes we only take care not to dishonour him; but we are capable of doing more than this, we are capable of honouring him by our words and actions, as well as by our thoughts. Our words or actions will bring our pious sentiments into our own view, so as to strengthen and improve them in ourselves; and they will likewise bring them into public view, so as to excite the like sentiments in other men. Since therefore it is our duty to honour God, and since we honour him in the best manner, that we can, by strengthening and improving our own pious sentiments of him, and affections towards him, and by exciting the like sentiments, and affections in other men; it follows, that some external worship of him, both private and public, is a duty, and that irreligion or the neglect of such worship is a crime by the law of nature. If it was otherwise, I know not how we should be able to prove, that the law of nature forbids idolatry, which consists in paying this external worship to a false god, or in attributing, by our words and significant actions, the power, wisdom, and goodness of the Creator to some of his creatures, to the work of our own hands,

or to the inventions of our own imaginations: provided they, who pay such external worship to a false god, entertain in their minds just and proper sentiments of the true one. For, if external worship is an indifferent action, and is not due to God, he is not at all dishonoured, when we pay it to another. So effectually do they, who endeavour to set aside the obligations of prayer and thanksgiving, defend the worship of images, as it is explained at present in the church of Rome.

We may go one step farther. If God has at any time been pleased, by any positive revelation, to explain his nature, or to publish his will to mankind, and to afford us proper and sufficient evidence, that such revelation came from him; the law of nature will not allow us to treat it with contempt and ridicule, for this is profaneness. Nor are we at liberty to reject it without examining the evidence, by which its pretensions to be a revelation from God are supported: because, as we are obliged to obey his will, and to entertain true and just sentiments concerning him, we cannot but be obliged to make use of our best endeavours to discover what his will is, and to inform ourselves rightly concerning his nature and attributes.

It will likewise be contrary to the law of nature to reject such a revelation, even after we have examined it; if God, who perfectly knows the extent and limits of the human understanding, who is fully acquainted with the just measures of credibility, and with the reasonable grounds of assent, has attested such revelation with what appeared to him sufficient evidence for convincing mankind of the truth of it. Whoever rejects a revelation so attested does not pay the obedience, which is due, by the law of nature and the constitution of things, to the authority of God.

Duty to-
wards
mankind.

VII. Our right over our own actions is restrained in respect of mankind by the natural duties of justice and benevolence. We have seen already from whence our obligation to these duties is derived, and wherein the duties themselves consist. And since justice consists in doing no causeless harm to others, there must be as many sorts of injustice as there are perfect rights belonging to mankind, by the violation of any of which we may do them causeless harm.

Some acts of injustice have particular names given to them. Thus the causeless taking away a man's life is murder.—If the person murdered was our parent, it is parricide.—If we owed him any special obedience, such as a subject owes to his prince, a servant to his master, or a wife to her husband, it is treason.—Injuring a man in his bed, or violating that right, which he has to the affection and to the person of his wife, is adultery.—Injuring him in his liberty by causelessly taking it from him is false imprisonment.—Taking away his property against his consent, if it is done privately, is theft;—if it is done publicly and by violence, it is robbery;—if great numbers are concerned in such an act of violence, it is rapine.—If by some deceit or artifice he is led to give his consent to part with his property, when, if he had known the truth, he would not have parted with it, this is fraud. There are some acts of injustice, the names of which do not want any definition; because the name itself sufficiently expresses the nature of the act: of this sort are maiming, defacing, breach of contract, defamation, false evidence, &c.

We may likewise do injustice to a man, in respect of his property, not only by taking it from him unjustly at first, but likewise, as has been shewn already, by keeping it, or not restoring it to him, though we at first came honestly by it.

Benevolence is a general word, and signifies a disposition of doing good to any person or in any manner. But this general disposition has a different name given to it, according to the different objects of it, or the different ways in which it exerts itself.—When it is directed towards them, who have been kind to us, it is called gratitude.—When the distressed and afflicted are the objects of it, we call it pity.—When our enemies share in it, we call it generosity.—If it leads us to study the quiet of mankind by being mild in the judgments that we pass upon their conduct, and backward to censure their failings, we call it candour.—If it is employed in checking our pride and in preventing us from being so much puffed up, either by the station, that we are in, or by the good qualities, that we possess, as to make others uneasy, we call it humility.—If it exerts itself in relieving the poor and wretched out of our substance, it is liberality:—and the higher instances of liberality are called bounty.—If it restrains our anger and resentment, it is patience, forbearance, or long-suffering.—If it tempers the severity of justice, and softens the rigour of our lawful demands upon such persons as are in our power, it is mercy.—If it shews itself in an endeavour to make all men easy, who have any occasion to apply to us, by removing the difficulties of access to our person, and by conversing freely and openly with them, it is affability.—If it goes one step farther and seeks for opportunities of shewing such affability, it is courtesy.—The obligation to these several duties, as they are parts of benevolence, has been made out in its proper place: and whatever power we have of acting for ourselves, yet in respect of mankind we abuse this power, and apply it otherwise, than the law of our nature directs us, when we neglect them.

Several instances of a right in our own person.

VIII. Besides our liberty, or the right of acting in what manner we please, which has been mentioned already, we have several other rights in our own person. A man's life is his own; it is the gift of nature: and whoever deprives him of it, is guilty of injustice towards him. His limbs too are his own, for the same reason: so that he is injured by being maimed. He has a right likewise to freedom from pain, as far as no law obliges him to submit to it: he is injured therefore, if he is causelessly hurt by any blow, or wound. He has still a farther right to his good name, that is, to all the advantages or all the satisfaction, which he can receive from being thought or spoken of, as he deserves: scandal therefore and defamation are injuries to his person:

Duty towards ourselves.

IX. But it is proper to consider, how far we have a right to dispose of our person, or to manage it in any manner, that we please; whether our liberty, or the power of acting as we think fit, is, in respect of ourselves, under no restraint from the law of nature.

It seems to be self-evidently true, that no man can have a right to manage his own person, or to dispose of it in such a manner, as will render him incapable of doing his duty. For his duty is a restraint, which arises from the law of nature: he cannot therefore have any right to free himself from that, unless he has a right to free himself from all restraints, which the law of nature has laid him under. The consequence of this is, that a man's right to his life or his limbs is a limited right; they are his to use, but not his to dispose of. As they were given him to use, whoever deprives him of them does him an injury. But then, as they are not his to abuse or dispose of, it follows, that he breaks through the law of nature, whenever he renders himself

incapable of complying in any instance with that law, which the author and giver of his life and limbs, has required him to observe.

Upon this account we have no right to maim ourselves; if by such an act we shall become unable to discharge any of the duties of justice or benevolence.

And much less have we any right to kill ourselves; since by this means we become unable to discharge any duty at all. A duty, which we can release ourselves from at pleasure, is unintelligible; it is in effect no duty: the law of nature could not in any respect be binding upon a man, if we suppose him to have such a right in his own person, that he may at any time, by his own voluntary act, lawfully release himself from the whole obligation of it, or in any respect render himself incapable of performing it.

Upon the same principles we may easily understand, that all such luxury or intemperance, in eating or drinking, as either fills up too much of a man's time, and takes him off from his duty, or by disordering his understanding, clouding his judgment, and impairing his health, incapacitates him for the performance of such duty, are not within the bounds of his liberty; his power of acting, as he thinks fit, is restrained in these instances by the law of nature.

Some duties of chastity are plainly such as respect not only ourselves, but likewise other men; because a breach of those duties is an injury to others. Of this sort are adultery, and rapes: to which we may add the debauching virtuous women; because those women are thus deprived of their credit and reputation, and the peace and quiet of their family and relations are broken in upon. The consent of the woman, who is debauched, can no more excuse the injury than the consent of a person, who is cheated out of his property, can excuse the fraud. To

raise and enflame her passions, till it is not in the power of her reason to control them, and then to take the advantage of that weakness, which he, who debauches her, has been the occasion of, is the same thing in effect, as to mislead a person's understanding, and then take the advantage of his ignorance to cheat him out of his property.

There are other breaches of chastity, which the law of nature forbids; because they frustrate that end, for which the desire of the sexes towards each other was implanted by nature. Amongst these breaches of chastity, besides those of the grosser sort, we may fairly reckon common prostitution, and the debaucheries of such, as indulge their lusts with common prostitutes.

Having thus considered the rights, which a man has in his own person, and the several restraints, under which these rights are laid by the law of nature; we shall now pass on to the consideration of those rights which he has over the persons of others.

C H A P. XI.

Of Parental Authority.

- I. *Right of parents whence derived.* II. *Fathers authority superior to mothers.* III. *Three parts of childhood.* IV. *Parental authority in the first part of childhood.* V. *Parental authority properly so called ceases in the second part of childhood.* VI. *Honour due to parents in the third part of childhood.* VII. *Variations in parental authority shew the origin of it.* VIII. *Natural minority what.* IX. *What right of punishment included in parental authority.* X. *The law of nature may in some cases allow parents to sell their children.* XI. *Adoption is different from purchase.*

I. **W**E acquire a ^a right over the persons of others three ways; by generation, by their consent, or by their having committed some crime.

Right of
parents
whence
derived.

The right, which parents have over their children, arises originally from generation, not as its immediate, but only as its remote cause. If we were to follow Grotius, and to assign generation as the immediate cause of parental authority; there are several incidents in this authority, which we should not be able to explain. I chuse therefore rather to consider generation as the remote cause, and the duty of the parents, which arises from thence, as the immediate cause of that authority, which they have over the persons of their children.

It is the design of God, as far as we can collect it from his works, that the species of mankind should be

^a Grot. L. II. C. V.

continued : and as this cannot be done, unless children, when they are born, have some care taken of them ; it is the duty of mankind to maintain and provide for them. But since their maintenance and provision will necessarily be attended with some expence and trouble, such expence or trouble cannot justly be laid upon any other persons, but upon those, who were the occasion of it, that is, upon the parents. They therefore, because they produced the child, are obliged to maintain it, and to provide for it. Now it would be an injury to mankind to bring up a person in such a manner, as to be hurtful or burdensome : and upon this account the parents are obliged, not merely to maintain the child, but likewise to educate it in such a manner, as to prevent its being hurtful, and to fit it for some useful employment, that it may not be burdensome. But the manners of the child could not be so formed, as to render it useful, or even preserve it innocent, unless the parents have some authority over it. And since nature cannot be supposed to prescribe a duty to the parents, without granting them the means, which are necessary for the discharge of such duty ; it follows, that nature has given the parents all the authority, which is necessary for bringing up the child in a proper manner.

Fathers
authority
superior to
mothers.

II. Both the parents have authority over the child, because the duty of maintaining and educating it belongs to both. However, if the commands of the father and of the mother should at any time happen to clash ; the father is rather to be obeyed ; upon account, says ^b Grotius, of the excellence of his sex. And yet in his method of explaining the origin and foundation of parental authority, this reason can be of no weight : because upon supposition, that generation is the immediate cause of the power, which the parents have over the child, the mother who contributes as much as the

Grot. *ibid.*

father, or more, if we consider the trouble and uneasiness of gestation, must have an authority equal to the fathers, if not superiour to his. But if generation is considered only as the remote cause, and the duty of the parents, to bring up the child and to form its manners, is considered as the immediate cause of their authority; then the fathers authority will be superiour to the mothers, upon account of what may be called the excellence of his sex: for he is in general with good reason supposed to be better able than the mother to defend and to instruct it: and in proportion as his abilities are greater, his duty, and with it his authority, must be greater likewise.

III. ^b The whole time of childhood may be distinguished into three parts. The first is the age of infancy or minority; before the child has arrived at a perfect judgment to chuse for itself. The second is that part of the child's life, after it is past its minority, whilst it continues a member of the parents family. The third is so much of the age of maturity as remains, after the child has joined itself to some other family, or has erected a family of its own. For want of a better word, I have here made use of the word childhood in a more loose sense, than it commonly is used, to signify all the time of a persons life, that passes, whilst his parents are living.

Three
parts of
childhood.

IV. ^c In the first part of childhood, that is, during the infancy or minority of the child, all its actions are under the absolute authority of its parents. As it has then no reason of its own to judge, and no will of its own to chuse what is best; the parents, whose duty it is to take care of it, are to judge and to chuse for it. But no power can be more absolute than this; where the reason of the parents is the sole guide of the child, and where its will is concluded by theirs.

Parental
authority
in the first
part of
childhood.

^b Grot. *ibid.* § II.

^c *ibid.*

However though the authority of the parents, as far as it reaches, is absolute as to the degree of it ; yet it is not unlimited as to the extent of it. For since it arises out of the duty of the parents to provide for the good of the child, they have no authority knowingly and designedly to treat it or to dispose of it in such a manner as will be hurtful to it. Their duty to maintain and to educate it can never be reasonably supposed to give them a right to maim, or to expose, or in any way to neglect it.

But whatever promises or contracts the child engages in, or whatever other acts it does, without the consent of its parents, all such acts are void : it has no moral power of acting for itself, for want of reason and choice ; and upon this account whatever acts it does will, as to any moral effect, be as if they had not been done.

Parental
authority
properly
so called
ceases in
the second
part of
childhood.

V. In the ^d second part of childhood, that is, when the child is come to maturity of judgment, but continues in the family of its parents ; they have no parental authority, properly so called, over any of its actions. The authority of the parents arises from their duty to provide for the child and to take care of it, whilst it is unable to govern and direct itself : this authority therefore must necessarily cease, when the duty ceases, upon which it is founded : after the child is able to think and to judge for itself, it is no longer the duty of the parents to think and to judge for it ; and consequently the will of the child is no longer under the absolute control of their will.

However in this part of its life they have a demand upon it of gratitude, esteem, and reverence : it is still bound to honour them, by shewing them all marks of respect, and more particularly by paying a deference to their advice and direction : for as they, from their longer experience, are more likely to judge rightly than

^d Grotius *ibid.* § II.

the child is; so their former care of it may convince it, that they are disposed to contrive for its welfare. But notwithstanding the child owes them this duty of honour; they have not, as its parents, such authority over it, as will make void any acts, which it does without their consent, or even against their commands: because the obligations to these duties are of the imperfect sort; the person, who transgresses them, does not use his liberty agreeably to the law of nature; but the law does not suppose him void of such power of acting, as is sufficient to give a validity to what he does. If a man's parents have any more authority over him, than what has been described; it is an authority, which arises from his own consent, as a member of that family or community, wherein he continues, and of which his parents are the head.

VI. In the ^b third part of childhood, when the child has not only arrived at maturity of judgment, but has either joined itself to another family, or is become the head of a family of its own; the obligations of gratitude, deference, and esteem still continue, as long as its parents live: for the reasons, upon which these duties are founded, are perpetual. But as in the second part of childhood, so much more in this, no acts of the child, however wrong they may be for want of the parents consent, will upon that account be invalid.

Honour
due to pa-
rents in the
third part
of child-
hood.

VII. Grotius allows that these variations, which we have been mentioning are incidental to parental authority. And such variations are easily accounted for, provided this authority arises immediately from the duty of the parents, and remotely only from generation: because as the duty of the parents, in the first part of childhood, is different from their duty, in the second and third part of it; an authority, arising from that duty and depending upon it, will naturally vary with

Variations
in parental
authority
shew the
origin of
it.

^c Grot *ibid.* § VI.

the duty. Whereas upon his own principle, that generation is the immediate cause of parental authority, it will be difficult to find out any reasons, upon which these variations can be explained: because a relation, which arises from a personal act of the parents, cannot be changed: and consequently an authority, which depends upon this relation as its immediate cause, must be uniform or continue always the same, as long as the person continues, from whose act the relation arose.

Natural
minority
what.

VIII. ^f The law of nature cannot be supposed to fix any precise age, at which the absolute authority of parents shall in all cases cease, and all persons universally shall be looked upon to be capable of acting for themselves. Persons are then arrived at maturity, when they come to the use of their reason. But this happens at different times of life in different countries: in some climates the mind ripens faster, and attains to the use of reason sooner, than it does in others. In the same country too, it happens at different times of life to different persons: all, who live in the same climate, do not come to maturity of judgment at the same age. No particular person therefore can be said naturally to have arrived at years of discretion, or to be capable of acting for himself; till we have observed how that particular person behaves in common life: when he shews by his behaviour, that he has the use of his reason, then, and not till then, he is past his natural minority.

Civil laws do indeed usually fix some certain age, as the limit of minority for all the subjects. But if these laws are intended to copy nature as nearly, as general rules can copy it, in a point where there is naturally so much uncertainty; a different age must be fixed in different climates. Nor can the properest time be settled in the same climate, till long experience and many

^f Grotius Lib. II. Cap. XI. § V.

observations have shewn at what age the judgment of men in that climate is usually ripe. And since in the same climate some few arrive at the use of reason much sooner, and some few are much longer before they arrive at it, then the generality of the inhabitants; the laws of each country will copy nature the closest, if they fix the limit of minority neither at the earliest, nor at the latest age, when any person has ever been known to arrive at maturity of judgment; but at the middle age between those extremes, at the age when the generality have been found to arrive at it. Extraordinary instances are not the proper measure of nature: they are not the standards, whereby to fix a general rule, but are rather to be looked upon as exceptions from such a rule.

IX. The [§] authority, which parents have over their children, implies a power to punish or correct them; as far as such a power is necessary for obtaining the end, which that authority has in view. Since it is the duty of the parents to contrive for the good of the child, and to direct it to what is best for it, whilst it is incapable of judging and chusing for itself; as far as this end cannot be obtained without correction, they have a right to punish it: because nature cannot be supposed to enjoin an end, such for instance as the good of the child, to be pursued, without allowing such correction, as is necessary for obtaining that end. But then the end, which is the good of the child, limits the right of punishing: the parents cannot upon this principle have a right to inflict any punishment, but what is for the child's benefit.

What right of punishment included in parental authority.

From hence it follows, that the power of a parent to correct his children does not extend to the inflicting any capital punishment: because the child's good cannot be the end proposed in taking away the

[§] Grot. Lib. II. Cap. V. § VI.

child's life ; nor can such a punishment be in any manner consistent with the parents duty to take care of it, to bring it up, and to contrive for its benefit. Wherever parents have had any right of punishing more extensive than what has been described, in the second or third parts of childhood ; this right must have been derived from some other principle, and is no part of parental authority.

We may observe by the way, that as the power of parents to punish their children is limited to correction for their good during their minority, no fault of a child can justify the parents, if they disinherit it so far as to deprive it of sustenance, where it is under age and unable to provide for itself : because such a disinheritance would in effect be a capital punishment, as it would leave the child to starve. After it is come to such an age, as to be able to provide for itself, the faults which it commits, may justify a disinheritance of this sort : not because the parent has then any more right to inflict a capital punishment, than he had before ; but because he is then released from the duty of maintaining the child, and may dispose of his own goods in any proper manner that he pleases.

The law of nature may in some cases allow parents to sell their children.

X. ^h Where parents from the birth of the child, or at any time afterwards, whilst it is under their authority, are unable to subsist it ; there seems to be no reason against the selling it to any one, who will undertake the expence and trouble of bringing it up.

For nature, if it prescribed to parents the duty of providing for the subsistence of their children, cannot disable them from making use of the only means, that they have in their power, of discharging this duty. Grotius, consistently with his own account of the origin of parental authority, maintains, that the relation or habitude of a parent, which arises from the act,

^h Grotius ibid. § V.

whereby the parents become the authors of the child's existence, can no more be separated from the person of the parent, than the personal act itself can. Yet in the mean time he contends, that the child may be sold, in order to make a provision for it, when the parents themselves are unable to subsist it. But upon his principles, such a sale would be unintelligible: for unless the purchaser acquires at least the authority of the parents over the child so purchased, nothing is done by it: and it is impossible for him to acquire this or any other degree of authority, if this authority arises from a personal act of the parents, or from a relation depending upon that act, which is in its own nature inseparable from their persons. But upon the principles here laid down, the purchaser by undertaking the duty of the parent, so far at least as to maintain the child, acquires with it the parental authority. The usual event of such a sale is the slavery of the child: which event neither is nor can be brought about by the sole act of the parent, unless some other accident intervenes. By what accident this event is brought about will hereafter be the subject of a more particular enquiry.

XI. In like manner, when a child is adopted, so that the parent, who adopts it, does by his own voluntary act take it for his own, or engage for the care of it; he does by this act, with the consent of the natural parent, acquire a parental authority over it: for this authority goes along with parental duty, and is inseparable from it.

Adoption
is different
from
purchase.

I have not supposed the child's consent to be necessary in adoption; because, if it is under age, its consent is included in the consent of its parents. But if it is of such an age, as to have reason and a will of its own, the consent of the party adopted is necessary,

and adoption cannot proceed upon the sole act of the parents.

It may perhaps be asked, if the consent of the parents includes that of the child in case of adoption, why might not parents upon the same principle sell their children into direct slavery, or why is any thing else necessary to make the child a slave, besides the consent of the parents, when they sell it. The difference of these two cases will readily appear, if we consider, that the parents authority over the child arises from his duty to provide for its good; and consequently, where the good of the child is not the end proposed, this authority is nothing. Now adoption is for the child's benefit; and upon that account the act of the parent is binding upon it. But if the child should be supposed to receive any benefit by slavery, which scarce can be supposed, yet this benefit is not the end designed by slavery: the good of the master is the principal point in view; the good of the slave is merely accidental.

C H A P. X I I .

Of Promises.

- I. *What obligations arise from declaring our future intentions.* II. *Promises what.* III. *Promises of giving the same in effect as promises of doing.* IV. *Promises always relate to future time.* V. *Promises do not affect the heirs of the promiser.* VI. *No obligation from promises where there is no liberty.* VII. *No promise obliges to an impossibility.* VIII. *Unlawful promises not binding.* IX. *A subsequent promise cannot bind, where it is contrary to a former promise.* X. *Obligation of a promise may be in suspense.* XI. *Promises not to be evaded by a supposed tacit condition of circumstances continuing the same.* XII. *Promises of infants, idiots, and madmen do not bind.* XIII. *Rash promises in what sense binding.* XIV. *Promises become binding by acceptance.* XV. *Signs of consent in promises and acceptance.* XVI. *Fear makes a promise void in some instances, not in others.* XVII. *Erroneous promises how made void.* XVIII. *A man's agent may promise for him.* XIX. *Voluntary agent does not oblige.* XX. *What promises may and what may not be recalled when they pass through a third hand.* XXI. *Effects of acceptance by another either with or without commission.* XXII. *A man's heirs cannot accept a promise for him.*

I. **T**HE rights, which we acquire by promises, or contracts, or oaths, arise from the consent of those persons, over whom such rights are acquired. And as none of our rights are more necessary to be rightly understood than these; it will be worth our while to consider them at large.

What obligations arise from declaring our future intentions.

We may do good to other men, either by our property or by our actions, that is, either by giving them such things, or by doing them such services, as will be of use to them.

When we intend to do them any good hereafter, which we either do not chuse to do, or have not an opportunity of doing at present; the three ways, which ⁱ Grotius mentions of expressing ourselves concerning such future intention, may be reduced to two.

First, we may merely declare what our present intentions are, by saying, that we design to give them such or such things, or that we design to do them such or such services. Here, says Grotius, all, that is required to justify our declarations of this sort, is, that we speak the truth, or that, at the time of making the declaration, we have the same intentions, which our words express. For the mind of man, as our author goes on, has not only a natural power, but a right likewise, to change its design. But he ought to have added, unless it is under an obligation to continue in the same design. Now such a declaration, as we have been speaking of, made in my favour does not indeed give me a perfect right over the person of him, who made it, or over the thing, which he designs to give me; and consequently it does not lay him under a perfect obligation either of doing me the service or of giving me the thing: but yet it lays him under such an obligation as a wife or a good man will attend to. A wife man would not willingly lay himself open to the charge of levity, of forming his designs by chance, and altering them again without reason. And unless the motives, which engage him to change his designs are notorious and weighty, he cannot easily escape this charge, if he does not act up to what he has declared. Besides; we are apt to alter our schemes of life, to bring the expected profit or service into our plan of

happinefs, and to live, as if we were to receive it. A difappointment therefore does not leave us in the fame condition, that we fhould have been in, if no fuch hopes had been raifed : our purfuits will have been changed by them ; and we fhall perhaps have loft fight of what might have been obtained, if we had continued to purfue it, and had not been called off to another fcheme of happinefs by thefe delufions. What is ftill worfe, we may have been led to live more expenfively, in expectation of having our fortunes bettered, or to engage in difficulties, out of which we cannot extricate ourfelves, in hopes of fuch fervices, as would have enabled us to furmount them. This may be faid in fome meafure to be our own fault ; we ought perhaps to look upon all future events as uncertain, and never to depend fo much upon them, as to be hurt, if we are difappointed. But allowing this to be always the cafe, a good man would never, if he can avoid it, be even the innocent caufe of hurt to others. However in fact it is not always fo : there are many favours, which a man is not capable of receiving without changing his way of life : what therefore is he to do, where he is made to expect fuch favours as thefe ? It would be imprudent in him, if he did not qualify himfelf to receive them ; when declarations are made, that fuch favours are defigned him : and if he does change his way of life, or his courfe of ftudies, in order to qualify himfelf for them, a difappointment robs him of other advantages, which he might have expected by going on in his former purfuits, or of advantages, which he was fure of, if fuch falfe hopes had not been raifed in him, as engaged him in expences, that his fortunes, without the expected improvement in them, were not able to bear. A wife man therefore, for his own fake, or out of regard to his own character, and a good man, for the fake of

others, or out of tendernefs to their welfare, will take care to keep his defigns to himfelf, and to make no declarations about them; till he has well confidered the matter, and finds no likelihood, that any thing will intervene, which may oblige him to fail in making them good. Or if he has been led to declare fuch favourable intentions, he will take care to abide by them, and to bring them into execution; unlefs the accidents, which prevent him, are fuch, as may appear to the world, and fuch too, as will juftify him in the common opinion.

We may go one ftep farther in this way of fpeaking about what is future; we may not only declare what our prefent intentions are, but may add, that thefe intentions are not unfteady, that we are not only in earneft now, but will continue in the fame mind, when the time comes for putting thefe intentions in practice. This additional declaration does not confer any perfect right upon the perfon, in whole favour it is made, or does not give him any ftrict demand upon us. But it ftrengthenf our reafons for making our defigns good; both becaufe it would be an inftance of greater levity to change what feems to have been thus fixedly and unalterably refolved upon; and becaufe a difappointment to thofe, who are made to expect our favours, will be fo much more hurtful, in proportion as their expectations were raifed higher.

Promifes
what.

II. The fecond way of fpeaking concerning our prefent intentions of giving a man hereafter what may be ufeful to him, or of doing for him hereafter fome beneficial fervice, is by making him a promife. This is not merely a declaration of our prefent intentions in reference to fome future gift or fervice, with a fufficient fign of our being in earneft, and of our having

determined with ourselves to continue in the same mind; but it contains likewise a declaration that we now design to give him a right to demand such gift or such service hereafter.

III. ^k Grotius seems to make a small difference between promises of giving and promises of doing; when he says, that the former are the first step towards the alienation of our goods, and that the latter are the actual alienation of some part of our natural liberty. But it would be difficult, if we follow this distinction closely, to shew, that any demand at all is conferred by a promise of giving: because it does not appear what it is, which he, to whom we make such a promise, has a demand upon. The distinction does not seem to allow, that his demand is upon the person of the promiser; for he is not understood to have alienated any part of his liberty; this being supposed to be the peculiar effect of promises of doing. Nor is his demand upon the thing promised; because the distinction supposes, that the thing is not alienated, but only that the first step is taken towards the alienation of it. But if a promise to give a man a thing confers upon him no right, either over the person of the promiser, or to the thing promised, it cannot possibly confer upon him any right at all: and if he acquires no right by the promise, then the promiser cannot be laid under any obligation by it.

Promises
of giving
the same
in effect as
promises
of doing.

But in truth, there is not in this respect any difference between promises of giving and promises of doing: the obligation of them both is upon the person of the promiser; and they are either of them alienations of his liberty. Before I make a promise of giving any particular thing to a man, I am at liberty whether I will give him it, or not: but after the promise is made, I have no moral power or right

not to give; in regard to not giving I have parted with my liberty, by conferring upon him a right to demand, that I should act in such a manner as the promise expresses. He has no claim upon the thing promised; because I did not actually give him the thing, but only engaged, that I would give him it; I did not make it his, but gave him a right to demand of me at some future time to do whatever act should be necessary.

Thus promises of giving are in some sort promises of doing. The effect of them both is in one respect the same: they effect the liberty of the promiser, and tie him down to that particular action, which the promise contains or implies. If they are promises of giving, they tie him down to the action of giving; if they are promises of doing, they tie him down to the actions or services, which are specified in them.

Promises
always re-
late to fu-
ture time.

IV. Promises are sometimes distinguished into such as are made in words of future time, and such as are made in words of present time. But this distinction is without foundation. What is called a promise in words of present time can scarce be so explained, as to give it the appearance of a promise: it is either an actual performance, or it is nothing at all.

Promises of giving in words of present time are actual performances. If I say, that I now give you such or such a thing; what is so given does, upon your acceptance, immediately become your own; this act is a direct alienation of my property. I may indeed delay putting you into possession by adding, that I will deliver to you at some future time what is so given. This exception, as to the time of delivery, may make the whole matter have the appearance of a promise rather than of an actual performance: but then it is to be observed, that as far as this exception is concerned, the words will be of future and not of pre-

sent time. However, if we consider the effect of such an exception, we shall find, that it is in itself no promise ; nor does the act of giving become a promise by the addition of it. Such an exception instead of conferring any particular right upon you, limits your claim ; it is added for my benefit, and not for yours. Upon my giving you the thing, you had a right to immediate possession : and by engaging to give you possession at some future time, I only postpone this right. This will be clear if we observe, that when the time of delivery comes, you will have no other right to the actual possession of the thing, but what you would have had at the instant of giving, if I had not added this limitation. And certainly as such a limitation confers no right, either perfect or imperfect, it cannot with any propriety be called a promise, or part of a promise.

As to promises of doing in words of present time, if we would endeavour to express them so as to distinguish them from promises of the same sort in words of future time, we shall find them unintelligible. I know not how to promise a man a present service, unless I am actually doing it ; and a promise of it, whilst I am actually doing it, is ridiculous.

This distinction is sometimes applied to promises of marriage : but it will be very difficult to shew, that there is any such thing as a promise of marriage in words of present time, which is not an actual marriage. If the man promises to the woman, that he will marry her ; this is promising in words of future time : if he declares, that he does marry her, there is nothing naturally wanting but her acceptance to complete the marriage. It is only civil institution, which prevents such a transaction from being looked upon in any other light. In almost all civil communities some particular forms and ceremonies are established for the celebration

of marriage. And consequently, if such forms and ceremonies are considered by the law as necessary to make the marriage binding upon the parties, the same law, which makes them necessary, cannot call any act a marriage, where they have been omitted. Now as a man's declaration, that he does marry a woman, is more than a promise of marriage; and yet civil laws, for the reason before mentioned, decline giving it the name of an actual marriage; a sort of middle name has been found out for it, and it has been called a promise, or because acceptance of such promise makes it mutual, it has been called a contract, in words of present time.

It may perhaps be apprehended, that such a transaction is not called a marriage, but only a promise, in words of present time, for want of consummation. But consummation in marriage is like actual possession in gifts. As in giving a thing by words of present time, the delay of actual possession does not change the act of giving into a promise; so neither does an agreement, in words of present time, between two parties to take each other for man and wife, become no more than a promise by the delay of consummation.

In one view indeed all promises may be considered as expressed in words, which relate to the present time. They declare a present intention of conferring upon the person, to whom we make them, a demand upon us for some future performance. To tell a man, that I will give him such a thing, or that I promise to give him it, or that I give him a demand upon me for it, are all of them expressions, which the common use of language has made to be of one and the same import: and any of them confer on him a right over my person. They do not indeed alienate my property in the thing, or transfer it to him; but they alienate a part of my liberty, and bind me to the future performance of such an act, as will transfer the thing to

him. If I promise a man to serve him in such or such instances; if I say, that I will do him such or such good offices; these and the like expressions tie me down to a particular way of acting; they give him a demand upon me so to act, or alienate the liberty, which I had of acting in any other manner.

When promises of giving and promises of doing are thus explained, there appears to be little difference between them. Both of them are in effect promises of doing; since each of them conveys a right to the person, that we make them to, of demanding that we shall act agreeably to what is expressed in the promise. If it is a promise of giving; the demand of those, to whom we make it, and consequently the personal obligation, which we are under, is, that we shall do such acts, as are necessary to transfer to them the thing promised: if it is a promise of doing; the demand on their part, and the obligation on ours, is, that we shall do such acts, whatever they are, as are contained in the promise.

V. From hence we may see the reason, why the obligations of a man's promise do not of themselves descend to his heirs. They are alienations of his own liberty, and consequently, being obligations upon his person only, do not affect his property: even promises of giving confer no direct or immediate right to the thing promised, but only a demand upon the person of the promiser to give such a right hereafter. Where a man has charged his goods with any obligations; the heir, who cannot receive the goods in any other condition than what the ancestor leaves them in, is by receiving the goods involved in the obligations, that are connected with them. But all obligations, which reach no farther than the person of the promiser, cease with his person. And since the obligations of promises

Promises
do not af-
fect the
heirs of the
promiser.

are of this sort, it is matter of bounty only, when the heir undertakes to make good the promises of his ancestor.

No obligation from promises, where there is no liberty.

VI. Since a promise is an alienation of part of our liberty, by giving the person, to whom we make it, a demand upon us to act in such a particular manner, as we have engaged for; the consequence is, that we cannot oblige ourselves farther by promise, than our liberty reaches: for since no man can alienate what does not belong to him, no man can give up that liberty to another, either in whole or in part, which he never had himself.

No promise obliges to an impossibility.

VII. From hence it follows, first; ¹ that no promise can oblige us to an impossibility. It is certain indeed, that we could never perform such a promise: but, when I say, that it does not oblige us, I mean something more than this; I mean, that whatever folly there may be in making such a promise, there is no wrong or injustice in not performing it. For where a man has no demand upon us, we can do him no injury: and the person, to whom we make a promise, can have no demand upon us, if the promise is void in its own nature. But since a promise consists in an alienation of a part of our liberty, it must be void, or must be as if there was no promise, where no such alienation has been made. Now we have not, and never could have, the liberty of doing what is impossible; we cannot therefore, in respect of what is so, alienate our liberty, that is, we cannot make such a promise, as will be binding upon us.

Unlawful promises not binding.

VIII. Secondly; ^m no unlawful promises can oblige those who make them. As they have not the liberty of doing what the law has forbidden them to do, they cannot alienate their liberty so as to give any person a demand upon them to do it. When I speak of unlawful promises, I do not mean those only, by which we engage to give or to do what the law of nature forbids

¹ Grot. *ibid.* § VIII.

^m *ibid.*

to be given or to be done by us : where the matter of a promise is forbidden by any other law, by the positive law of God, for instance, or by the law of the land, or by the commands of our lawful superiours, as far as they have a right to command us, such a promise is void ; we have done nothing by making it, and consequently have not obliged ourselves to the performance of it. The reason why we have done nothing by making it is, because the law, as far as we owe obedience to it, has taken away our liberty ; and we cannot alienate our liberty, where we have it not.

IX. Thirdly ; a second or any subsequent promise, which is contrary to one, that was formerly made, cannot oblige us, or cannot make void the former promise. When we have once alienated a part of our liberty, it is not our own to dispose of again : when we have given one man a demand upon us to act in a particular manner, we have parted with our liberty in this respect, and cannot give another man a demand upon us to act in a contrary manner. What is here said of promises is equally true of all other sorts of voluntary obligations. Any former obligation takes away the liberty of the person, who is engaged in it ; and where he has no liberty he can do no act, which will be valid, and consequently none, which can be binding upon him. Indeed upon any other supposition, there would be no such thing as any possibility of a man's being obliged at all by his own act ; which in morality is deemed an absurdity. For if a second obligation could make void the first, then a third might make void the second, and a fourth might make void the third, and so on without end.

A subsequent promise cannot bind where it is contrary to a former promise.

X. ⁿ If the matter of a promise is impossible or unlawful at the time of making it, but the circumstances of the promiser are such, as may be altered, and a change in his circumstances would render it possible or

The obligation of a promise may be in suspense.

ⁿ Grotius *ibid.*

lawful for him to perform his promise ; it may be questioned whether a promise of this sort is binding : because it may be thought, that as the promiser engaged for what he had, at the time of engaging, no natural or no moral power to perform, his act was originally void ; and that no accident, which shall happen afterwards, can give a validity to what was so void in the first instance. But here it should be observed, that the act is not so far void from the beginning, as that no future event can make it binding. Where a man's words can be so interpreted as to have any meaning, we are always to follow that interpretation, which will give them a meaning. And if the promiser had any meaning at all, it must be this — that he would give the thing or do the act promised, whenever it should be in his power, or whenever by any change in his circumstances it should become lawful. This condition is sometimes expressed in promises of this sort ; and when it is not expressed, the rule of interpretation before laid down naturally leads us to suppose, that it was implied. But where such a condition is either expressed or implied, notwithstanding the present impossibility or unlawfulness in the matter of the promise, the promiser does something : he gives those, to whom he thus engages, a demand upon his person not to use his liberty otherwise, upon a supposed event, than according to the terms of his engagement : he might upon this event have his liberty, but he alienates it beforehand : if the matter of the promise ever can be possible or ever can be lawful, his liberty of acting is his own in possibility ; and as far as it is his own, he consents to part with it. The obligation of these promises is in suspense, and then only takes place, when the event happens, which renders the matter of them possible or lawful.

Sometimes it depends upon ourselves, whether it shall be possible for us, or not, to perform our promises: some act or some endeavours of our own may put us into such a situation, as will make the performance possible. A promise in this case binds us to the doing those acts, or to the using those endeavours; though such acts and such endeavours are not expressly contained in it: for he, who has obliged himself to the end, cannot but be understood to have obliged himself to the necessary means. Or rather; nothing can be properly called impossible for a man to do, which by his own acts or his own endeavours can be brought about. A promise therefore of this sort is binding from the beginning: and though we have not in express words bound ourselves to do those acts or to use those endeavours, yet if the possibility of performing what we have promised depends upon them, we are obliged to them in virtue of our promise.

XI. Some have imagined, that all promises are to be understood to contain a tacit condition, that the promiser continues in the same situation, as when he promised. I do not mean a tacit condition, of being obliged, only if the matter of the promise continues possible or lawful to him: for there is no occasion to suppose such a condition, since the obligation of the promise, in such a change of situation, would cease of itself without the help of any tacit reserve. But I mean a reserve, that, when the time of performance comes, it shall be as convenient to the promiser to make good his word, as it was at the time of promising.

Promises not to be evaded by a supposed tacit condition of circumstances continuing the same.

Such a tacit condition as this, if the promiser is allowed to explaine it, will put it into his power, either to be obliged or not obliged, at his own pleasure. For it is next to impossible for the circumstances of any man to continue so exactly the same, as not to give

him an opportunity of finding out some alteration in them, between the time of promising and the time of performance. And it would be absurd to suppose a condition to be tacitly annexed to any obligation, which is of such a sort, as to leave the obligation to the discretion of the party obliged.

But if the party, to whom the promise is made, is to be the judge of the others circumstances; if it is left to him to determine, whether such a change has happened in them, as to set the obligation aside; such a tacit condition will be of no use to the promiser: he must, notwithstanding this reserve, stand to the courtesy of the party, to whom he is obliged; and he could only stand to his courtesy to be released, if we suppose no such tacit condition.

Men of loose principles are apt to pretend, that they promised under this condition, though they did not express it; not only when the performance of their promises, by a change in their circumstances, is become a real hardship, and common benevolence would engage the other party to release them; but when they find, that by breaking their word they may make some petty advantage, which they could not make by keeping it. If there was any way of convincing men of such a character, that their promises could not suppose any such tacit condition, it must be when in making them, they have expressed some other condition. The surest way of making a promise absolute, in all other respects, is by annexing some one express condition to it. Where one condition is expressed, the natural presumption is, that no other is implied or understood: because if there had been any other in the mind of the promiser, such a fair opportunity, as that of mentioning one condition would in course have led him to mention that other: when he designed to

make conditions, and was employed about making them, he mentioned only one; we have therefore good reason to believe, that he thought of and intended no more. Upon this account the strongest form of promising is, to annex some slight condition to the promise, such as—If I live;—If I have my senses;—or some other of the like sort.

XII. ° No promise is binding, unless the person, who made it, has liberty to chuse for himself, and understanding to direct him in his choice. Without these faculties of liberty and understanding, he is no moral agent, or is not capable of doing an act so as to produce any moral effect by it. Upon this account the promises of infants, ideots, and madmen are not binding; they are not moral agents, and are therefore unable to do any valid act.

Promises
of infants,
ideots, and
madmen
do not
bind.

XIII. If it should be enquired, whether a rash promise is binding; it would be necessary, before we determine upon this question, to examine what is meant by a rash promise. The words are sometimes used to signify only a promise, which is made unadvisedly, or without sufficient deliberation, and sometimes to signify a promise, where the matter for want of such deliberation is unlawful. As to the latter sort of promises, they are void in themselves, without considering, whether they are rashly or advisedly made; promises, if the matter of them is unlawful, are not binding, though they were made with ever so much deliberation.

Rash pro-
mises in
what sense
binding.

Promises, which are called rash in the former sense, merely because they were engaged in too hastily, if there is no other defect in them, are binding. Every act of a person, who has liberty and understanding, must always be considered as the result of proper deliberation: if he has these faculties, the presumption is, that he made use of them; and it was his own fault,

if he did not. If it was otherwise, if a man's having these faculties was not a sufficient ground to presume, even against his own subsequent declaration, that he made use of them; there could be no effectual obligation derived from any human act whatsoever; because the agent need only declare in any case, after the act is over, that he did not act deliberately, and then the obligation would be void.

Promises
become
binding
by accept-
ance.

XIV. ^p Before we go on to consider some other questions relating to promises, it may be proper to observe, that a promise is not binding, till it is accepted. The party, to whom it is made, does not without acceptance acquire any right or demand upon the promiser: for no right or demand of any sort can be acquired, without the consent of him, who acquires it. And unless some person has a demand upon the promiser, he is under no obligation.

^q From hence it follows, that a promise, after it is made, may be recalled without injustice; provided this is done, before such promise is accepted: no right or demand is acquired, till the acceptance of the promise; and where there is no right, there can be no injustice. It ought however to be remembered, that as in alienations of property, so likewise in promises, it is not necessary for acceptance to follow the promise in order of time. When a person asks us to make him a promise, and we make it at his request; the promise becomes binding immediately; so that we cannot justly recall what we have done, upon pretence, that he has not accepted it. His request is a sufficient evidence of his acceptance, though it went before the promise; unless, by any subsequent act or declaration of his, it appears, that he had changed his mind.

^r There may be some doubt perhaps, whether mere acceptance is sufficient to bind the promiser, or whe-

Grat. *ibid.* § XIV. ^q Grat. *ibid.* § XVI. ^r Grat. *ibid.* § XV.

then it is not necessary, that he should know of such acceptance. When the promise is made under either of these forms—I will that it shall bind me, when it is accepted—or I will, that it shall bind me, when I know it to be accepted, —such precision leaves no room for this doubt. But when these forms are not observed, it seems to be the truer opinion, that in strict justice there is no obligation upon the promiser, till he knows of the acceptance: because an acceptance, which is not made, and an acceptance, which does not appear, are in respect of him the same thing. But yet if the promiser, without waiting a proper time to know the other parties mind, should recall his word, he could not escape the charge of levity.

XV. The manner of promising, or of refusing, when a request is made to us, and the manner likewise of accepting a promise, must be some external mark of the minds intention. Nods may indeed bear the construction of consent, or shrugs of refusal: but these are not established marks either of the one or the other; common usage has not sufficiently established their signification. The best established declarations of our mind are words either spoken or written. In some cases indeed our consent may be "collected from our silence: but then there ought to be some special reason, why if we did not consent, we should speak: for silence when there is no such reason, will not easily bear this construction; in many instances we might fairly be supposed to have been silent, only because we had no mind to speak.

Signs of
consent in
promises
and ac-
ceptance.

XVI. ^s Before we can determine, whether we are bound by a promise, which is extorted from us by force, or by threatening us with some great harm unless we make such promise; it will be necessary for us to distinguish whether the force so made use of comes

Fear
makes a
promise
void in
some in-
stances not
in others

^s Grof. *ibid.* § VII.

from the party, to whom we make the promise, or from some one else; and if it comes from him, we must distinguish farther, whether that force is just or unjust, that is, whether he has any right or not to threaten us with such an evil, as is the occasion of our making the promise. If we were to determine, that no promises, which arise from fear, are binding, and to ground our determination upon this principle, that the promiser, when such force is made use of as produces his fear, has not liberty to chuse for himself; and is upon that account incapable of binding himself, it is plain the words of the question are what lead us to this determination, rather than the sense of it. Force is commonly opposed to liberty: and from thence we are induced to conclude too hastily, that where a promise is extorted by force, the promiser has not his liberty. But the force here supposed is not such as will leave the promiser no liberty of chusing for himself: he is forced indeed to chuse one part of a disagreeable alternative, either to make the promise, or to suffer the evil, with which he is threatened. But however disagreeable the alternative may be; yet, when he has two things to chuse out of, he cannot be said to have no liberty. It must be a very ill-natured and inhuman doctrine to teach, that the word of a person, when he is in distress, and makes a promise in hopes of being relieved from it, is not as much to be relied upon, as when he is in full ease and happiness: and yet this must be the case, if a promise, which we are induced to make from the apprehension of some great evil, is not binding upon us, merely because in such circumstances we have not a proper degree of liberty, as having only a disagreeable alternative before us, and being forced to chuse out of two things, neither of which would have been the object of our choice, if we had been in a better

condition. Grotius was aware of this; and when he is considering only the situation of the promiser, he determines such an extorted promise to be binding.

His opinion, when he comes to speak of the other party, is very singular, and cannot be made intelligible. If, says he, the person, to whom the promise is made, extorts it by bringing the promiser into any unjust fear, he is obliged to release such promiser; not because the promise was originally void in itself; but upon account of the unjust damage, which he has done him. But how the promise can be valid, and the promiser not be bound by it; or how the promiser can be bound, and yet the other party have no demand upon him; or how this other party can have a demand, and yet be obliged to give it up; is above my comprehension. An obligation on one part implies a demand or right on the other part. If therefore the promise is valid, or, which amounts to the same; if the promiser is obliged to performance, the party, to whom such promise is made, must have a right to demand performance. But then, as a right to make such demand upon the promiser is inconsistent with an obligation to release him; it follows, that one part of our authors opinion cannot be true: he must either allow the promise to be void, or must give up his notion of the other party's obligation to release the promiser.

To clear up this matter, let us return to our first distinction. If the promise is extorted by any unjust threatenings, and the party to whom it is made is the author of this unjust fear; such a promise is not binding: not upon account of the promiser's fear, but upon account of the other party's injustice. No right can be founded in an injury: every unjust act is void, as to all the moral effects of it, and consequently can

never produce a demand in the person, who is guilty of it. Now all obligations imply a right, which corresponds to them. Therefore, if there is no right on the part of him, who unjustly extorts the promise, there can be no obligation on the part of him, from whom it is so extorted.

Upon these principles it will appear, that all promises, which arise from fear, and even from unjust fear, are not void, though some are. If a magistrate, by the fear of lawful penalties, forces me to make such promises or other stipulations, as I ought to have made without the use of force; my promise, notwithstanding the threatenings and fear, from whence I am induced to make it, will be binding. There is nothing on my part, let the fear arise from what cause it will, which renders me incapable of binding myself: and if it arises, as is here supposed, from a just cause; there is no injustice in the other party, and consequently nothing which renders him incapable of acquiring a right. Nay even where the fear is unjustly brought upon me, my promise will be binding; provided the fear arises from a third person, and the party, to whom I make the promise, is not concerned in the injustice. If I am afraid of being murdered, because some one has threatened it, and promise a reward to a person for guarding me; though I am unjustly brought into this fear, yet my promise will oblige me. There is, as in all cases of fear, nothing on my part, which disqualifies me from obliging myself: and as the guard, to whom I make the promise, does me no injury, he is not disqualified from acquiring a demand.

When therefore we maintain, that an extorted promise does not oblige; it must always be done under these restrictions, that we are unjustly brought into fear, and that the party, to whom we make the promise, is concerned in the injustice.

XVII. † Where some mistake or error in the promiser is the only real and true cause of his making the promise; the obligation of such promise is void. When the supposed truth of a fact determines us to make a promise, where, if we had been rightly informed, we should have made none, we consent to be obliged upon supposition, that the fact is true; and consequently the truth of the fact becomes a condition of our promise. If therefore the fact is false, the promise must be void: because all conditional promises are void, where the conditions are not made good; or because no man is obliged farther than he consents, and in the case now under consideration, we consent to be obliged no otherwise than upon supposition, that the fact is true.

Erroneous
promises
how made
void.

It ought however to appear plainly from the promiser's words, or from the circumstances of the promise, or from the matter of it, that his error was the sole reason, which effectually determined him to make it: because, if his obligation was to be void, where this does not appear; it would almost always be in his power to make his promise void, at his own pleasure. He might pretend, that he was in some error, and that, if he had been well informed, he should not have engaged in such a promise. An error, which does not appear, is of no more account in our dealings with one another, than an error, which does not exist: the law of nature cannot allow any effect to be obtained by what does not fall under the notice of mankind. Caius is a candidate for a certain office, and I promise him my vote: at the time of making this promise, I supposed that Sempronius, to whom I have particular obligations, would not be his competitor: but before the day of election I find, that he is. If this supposition of mine did not appear at all, if it was not plainly the reason, which induced me to make this

† Grot. *ibid* § VI.

promise, it cannot affect the promise, after it is made, so as to set it aside. I might not have this supposition in my mind, or if I had, yet since all men are not determined in their actions by principles of gratitude, I should perhaps have made the same promise, whether I thought about Sempronius, as a competitor, or not. But if, when I engaged to Caius, I expressly told him, that I had great obligations to Sempronius, but believed his present situation to be such, as made me imagine, he would not offer himself; a declaration of this sort plainly shews, that I had this supposition in my mind, and that it determined me to engage myself to him. Or if Caius, when he applied to me, had said, that notwithstanding my obligations to Sempronius, I might safely engage to him, because my friend would not oppose him; and in consequence of this assurance, I promise my vote to him; though my own words might not shew what supposition determined me to this promise, yet the circumstances would shew it plainly enough to release me from any obligation, when I find afterwards, that Sempronius is a candidate.

A man's
agent may
promise
for him.

XVIII. "As we may bind ourselves by a promise, which we make in our own person; so likewise we are obliged to stand to a promise, which another person makes for us, where we have given him either a general commission to act for us in all things, or a particular commission to act in this affair. In either case by such a commission, where he keeps within the bounds of it, we have made his act our own.

Where we have given a man a power or commission to act for us, as our proxy; though no restriction or limitation of such commission may appear, yet it frequently happens, that we give some private instructions to such proxy or agent, in what manner we

^u Grot. *ibid.* § XII.

would have him act, and how far he may go. Suppose him then to act contrary to these private instructions, and to go farther, than we allowed him; we shall be obliged to stand to the promise, which he makes for us, notwithstanding our consent seems to be wanting. For that act of our will, whereby he was appointed our agent, which is the only act of our will, that is or can be known by the party, to whom the promise is made, is sufficient to make what such agent does for us be considered as our own act. The private instructions, which we gave him, cannot affect any one, to whom they are not known, and from whom we were determined to conceal them: they cannot therefore so affect the party, to whom the promise is made, as to prevent his claim upon us: the consent, which appears to him, must, in respect of him, be looked upon as our true and full consent. If it was otherwise, there would be such room for collusion between the promiser and his agent, that it would be in their power at any time to prevent any obligation from arising upon promises thus made.

However, though our limitations or secret instructions, in respect of the party, to whom the promise is made, are considered as not in existence; because they neither do nor can appear to him, and consequently cannot invalidate his claim, which arises from our public consent or apparent act; yet they will produce their proper effect upon the person, to whom they are known. Our agent knows them: and the effect, which they produce upon him, is to make him answerable for any loss or damage, that we may sustain by his having exceeded them: because by undertaking to act for us under these restrictions, he has at least tacitly obliged himself not to act otherwise.

Voluntary agent
does not oblige.

XIX. ^w When we have appointed an agent to promise for us ; the agent may happen to die, before he has transacted the business, and some other person, who knew, that he was our agent, and for what purpose, may possibly undertake to make the promise without our appointment, which he was to have made, if he had lived long enough to do it : in this case no obligation arises upon us from the act of such person. For want of our appointment, that is, for want of our consent to what he has done, it cannot be looked upon as our own act. If indeed our promise was contained in a letter, and the bearer, to whom we entrusted the letter, dies ; but after his death this letter is delivered by some one else to the party, to whom the promise is made ; the promise then becomes binding upon acceptance. The first bearer of the letter was not our agent ; the letter is to promise for us, and is the instrument of our consent : and it is not at all material whether the instrument, by which we designed to bind ourselves, comes to the hands of the party, to whom we make the promise, by the hands of the first bearer, to whom we entrusted it, or by the hands of any one else.

What promises may and what may not be recalled, when they pass through a third hand.

XX. Where a promise passes from the promiser to the other party through a third hand, we should consider whether this third person was appointed merely as a messenger to notify the promise, or as an agent to make it. If he was only a messenger to notify the promise, and the promiser recalls it before acceptance, but without acquainting his messenger, that he has done so ; such a revocation will have its effect : and though the messenger should afterward notify the promise, and acceptance should be made upon such notification, the promiser is not obliged to make the promise good. The obligation of such a promise

^w Grot. *ibid.* § XVII.

depends upon the will of the promiser, and not upon the will of his messenger: he had not bound himself to the messenger, and much less to any one else, to continue in the same mind or to abide by any act, which his messenger should do. This is the decision of Grotius upon the case. But he should have added, that the promiser, though he might have no opportunity of informing his messenger, that he had recalled his promise, should take care to acquaint some others with his having done so: because his revocation, if it did not appear, can be of no more account, than if it did not exist: and consequently without this precaution he could not in justice claim to be released.

But when the person through whose hands the promise passes, was appointed to make it, as the promiser's agent; then notwithstanding the promiser should recall it, before it is made, yet unless his agent is made acquainted with what he has done, and for want of such notice makes the promise, it will be binding. The agent's appointment continues, till he knows himself to be discharged; and the promiser by that appointment has transferred his power of acting in the case from himself to his agent.

Grotius, when he is taking notice of this distinction, applies it, in passing, to the case of gifts. Where I have made an actual donation, and have ordered a messenger to notify this to the person, to whom I so alienate my property, in order for his acceptance; if I die before this notice is actually given, and he upon receiving the notice, accepts; though this is done after my death, the donation is valid. It was complete on my part before my death; the messenger was not to make the donation for me, but to notify, that I had made it: and as to the other party's acceptance, by which the transfer is completed; this may as well

be done after my death as before it: since I am no way concerned in this act of acceptance, nor is any farther concurrence of mine necessary towards completing the transfer, than what I had given already. We should however observe, that such a donation can only take place as a will does, where no acceptance is made before the testators death: it must be some positive law, which, by taking the thing given into its custody, prevents it from becoming the property of the first occupant, between the givers death and the other partys acceptance. But if instead of making the donation myself, and ordering a messenger to notify what I have done, I appoint an agent to make it for me; then if I die, before it is made, the donation will be void; though my agent, not knowing of my death, should make it afterwards. The donation in this case was not actually made before my death, but was only ordered to be made; and after my death, as I cannot act for myself, so neither can I act by any other person: the appointment of any other person to be my agent or to do my acts for me ceases with my life, as I am then no longer capable of doing any act.

But what is here said relates only to actual donations, and not to promises of giving. Whatever may be the character of the person, through whose hands such promise is conveyed, whether he is a messenger sent by me, or an agent commissioned to act for me; if I die before acceptance, no subsequent acceptance can affect my heirs: since the obligation of my promise, even after it is accepted, is only personal, and consequently must cease at my death. A promise does not alienate my property in the thing promised, or give the party, to whom I make the promise, any claim upon the thing: it only alienates a part of my liberty, and gives him a claim upon my person to do such acts, as will alienate the thing hereafter.

XXI. * As we bind ourselves by promises, which another man, who is appointed to act for us, makes in our name; so likewise we may accept promises by our agent, and may acquire a right in virtue of a promise so accepted. But where a person, who happens to be present, when a promise is made, accepts for us, without having our commission for so doing; some doubt may be raised concerning the effect of such an acceptance. And it will be necessary in determining any doubts upon this head, to enquire whether the promise is made directly to the person, who is present, though it is made for our benefit; or whether the words of it shew, that it was made to us, who are absent, and that the person, who is present at the time of making it, is only appealed to as a witness of what has passed. Thus a promise relating to Titius, who is absent, may be made to Caius, who is present, under either of these forms. — I promise you, Caius, that I will give such a thing, or do such a service to Titius. — or, I promise Titius to give him such a thing, or to do him such a service, and do you, Caius, take notice, that I have promised it.

Effects of acceptance by another either with or without commission.

In the former of these cases, as the promise is made directly to Caius, though it is for the benefit of Titius, yet the acceptance of Caius binds the promiser: because the liberty, which he alienates by it, is alienated to Caius; and it is he, who acquires a right by this act over the promiser's person. It is therefore in his power to release the promiser, at any time before Titius has accepted it. But after his acceptance, it is out of the power of Caius to release such promiser; because by his proposal of the affair to Titius, and by the acceptance, which follows upon it, his right over the person of the promiser is conveyed to Titius. Suppose Titius should refuse the favour,

* Grot. Ibid. § XVIII.

this refusal releases the promiser, and he is no longer under the same obligation to Caius: because, as the benefit arising from the promise was a benefit to be received by Titius, upon his refusal to receive such benefit, the matter of the promise becomes impossible.

In the other case, if the promiser says, I engage to Titius who is absent, that I will give him such a thing, or do him such a service, and do you, Caius, take notice that I have so engaged; then upon supposition, that Caius has a general commission to act for Titius, or a special commission to act for this purpose, his acceptance will make the promise binding upon the promiser. But if he has no such commission, and does not accept, then the promise will, notwithstanding his attestation of it, be in the power of the promiser, who may recall it, if he pleases, at any time before it is accepted by Titius. Only as he had published the promise, it will be necessary for him to recall it publicly: otherwise, if the promise appears, but the revocation does not appear, the promise will stand good, and the revocation will be nothing, for a reason which has been frequently mentioned, and need not be repeated. Or lastly, suppose, that Caius, who is so called upon to attest a promise made to Titius, should, though he has no commission to act for him, accept the promise: then if the promiser does not agree, that he should accept it, his acceptance can have no effect; he is not appointed agent for Titius, and the promiser will not transact with him, as if he had that character. But if the promiser consents that he should accept; then notwithstanding he has no such appointment, this case will be reduced to the same state with the former case; the promise upon the acceptance of Caius will be binding, till it appears, whether Titius will accept or refuse the interest which he has in it: for it is the same

thing, whether the promiser engages to Caius for the benefit of Titius, or engages to Titius and allows Caius so far to stand in the place of Titius as to accept for him.

XXII. If a promise is made to a man, and he dies before acceptance, the acceptance of his heirs does not bind the promiser. However the promiser might propose to alienate a right over his person to the deceased, it does not follow, that he is willing to alienate the same right over his person to the heirs of the deceased. Nay we may go one step farther: if a promise is made to a man, and is accepted by him, but is not performed before his death; his heirs have no claim to performance, unless they were expressly included in it. If indeed it had been made to him and his heirs, his acceptance would be binding upon the promiser for their interest, as well as for his own. But if they were not included in it, if it was made to him without mentioning them; though he had accepted, yet the right acquired by such acceptance is merely personal, and dies with him.

A man's heirs cannot accept a promise for him.

This is too plain to be questioned in promises of doing. I have promised a man, who is candidate for a certain office, that I will give him my vote; he accepts my promise, but dies before the day of election; and his son offers himself as a candidate for the same office. No one would imagine, that my promise made to the father binds me to vote for the son.

Nor can any reason be given, why it should be otherwise in promises of giving, why if I promise to give a man a sum of money, and he accepts the favour of my promise, but dies before performance, his heir, unless he was expressly included in the promise, should have any claim to the money. If indeed the money, instead of being promised, had been actually given, the benefit of the promise would have descended to the heir:

but this is no reason, why, if the money had not been given, he would have the same claim upon me, that the deceased should have had. I intended to give to the deceased; it does not follow from thence, that I intended to give to his heirs: the benefit of my promise, if it had been performed, would indeed have descended to them; but this is accidental, and does not appear to have been in my intention, as they were not expressly mentioned in the promise. If I had actually performed my promise by giving the money, I could not upon his decease have demanded it again of the heirs: because by giving it, I had parted with all my claim to it, and the deceased had, before his death, acquired a right, not merely over my person by a promise, but in the thing itself by a transfer of it. He might therefore have disposed of it by will, if he had pleased; or if he does not do this it will descend to his heirs in intestate succession.

Promissory notes for money lent do not come under this description. The form of such notes—I promise to pay; especially if I add, for value received,—shews them to be more than mere promises; it shews that he, who gives such notes, acknowledges, that something was due to the person, to whom they are given: and consequently instead of being gratuitous promises, they are evidences of a debt.

C H A P. X I I I .

Of Contracts.

I. *What meant by contracts.* II. *Contracts are either of immediate or future performance.* III. *Contracts are either of partial or mutual benefit.* IV. *Contracts are either of giving or doing or both.* V. *No man by contract parts with more than he intended.* VI. *The nature and obligation of a loan of inconsumable goods.* VII. *Of a commission.* VIII. *Of a charge.* IX. *Contracts of mutual benefit either share the matter or make it common.* X. *Incapacity of either party to be obliged voids the contract.* XI. *What the equality required in contracts consists in.* XII. *Equality in the previous acts relates to knowledge and freedom.* XIII. *Equality in the principal act relates to knowledge of the price.* XIV. *Equality in the matter relates to faults in the goods or errors in the price unknown to either party.* XV. *Want of an equivalent how supplied in auctions.* XVI. *Price of things or work, what it is and how varied.* XVII. *Fair price is the market price.* XVIII. *Extraordinary circumstances allow to exceed the market price.* XIX. *Advantages by the introduction of money.* XX. *Metals the most proper materials for money.* XXI. *Uses and Rules of coining.* XXII. *Use of money varies the price of goods.* XXIII. *Buying and selling.* XXIV. *Letting and renting.* XXV. *Letting and hiring of labour.* XXVI. *Loan of consumable goods.* XXVII. *Interest for money upon what principles to be defended.* XXVIII. *Usury why*

forbidden by the Mosaic law. XXIX. Question relating to a loan. XXX. Nature of insurance. XXXI. Mixed contracts. XXXII. Gain and loss how adjusted in partnerships. XXXIII. Partnerships mixed with insurance. XXXIV. Contract of one party bearing the whole loss without any share in the gain. XXXV. Work and money how compared in partnerships. XXXVI. Contracts how dissolved. XXXVII. Contracts of chance their nature. and obligation. XXXVIII. Contracts with a man to do or give what we might claim are void. XXXIX. Contracts void, where the matter is unlawful. XL. Obligation how restored to void contracts.

What
meant by
contracts.

I. **I**N the last chapter we have considered at large the nature of promises. Where by promises I mean such acts, as lay an obligation on the party or parties concerned on one side, and convey a demand upon their person to the party or parties concerned on the other side. So that in promises, according to this description of them, there is no mutual obligation of the parties on both sides each to the other ; there is only an obligation to one part, and a correspondant right on the other part. ^y Such acts of mankind, as produce a mutual obligation, and consequently a mutual claim on the parties concerned on both sides, are contracts.

Contracts
are either
of immediate
or future performance.

II. Contracts are either such as are performed immediately, or such as we engage to perform at some future time. Those of immediate performance I shall call simply contracts, and those, which we bind ourselves to perform at some future time, may be called promisory contracts.

From this description of promisory contracts it will appear, that we need not consider them particularly : for the questions, which arise upon them, are either what may be determined from the rules relating to con-

tracts in general, or from those, which have been laid down relating to promises.

III. A second division of contracts is into such as Contracts are either of partial or of mutual benefit. are of mutual, and such as are of partial benefit. All contracts indeed suppose a mutual obligation of the parties engaged in them; but we shall find presently, that they do not all produce a mutual benefit.

IV. A third division of contracts is into ^a contracts of giving, or contracts of doing, or contracts both of giving and of doing. Contracts are either of giving or doing or of both. For all the benefit arising from contracts, whether it is partial or mutual, must arise either from things, or from actions, or from both. Only it is to be observed, that under the notion of things we here include not only goods, but money likewise, and the use of either goods or money.

V. The fundamental rule in all contracts is, that no No man by contract parts with more than he intended. man by engaging in them parts with more than he designed to part with; or that the demand of one party cannot exceed what was in the intention of the other party to transfer or give up to him.

By the design or intention of either party is not here meant any secret or reserved design or intention, which he kept in his mind, and never discovered. Such a design or intention, as does not appear, is in cases of contracts, as in all other cases, of no more account, than a design or intention, which does not exist. But by the design or intention of either party is meant such design or intention, as may be fairly collected either from his words or his actions. In the intercourse of mankind one with another, no person can be supposed to design or intend what does not appear in one of these ways; because there is no evidence and can be no knowledge of his designing or intending any thing else, but what does so appear.

^z Grotius *ibid.* § II.

^a Grotius *ibid.*

There is a plane reason, why no persons grant on one side, and consequently no persons just demand on the other side, as far as such grant is made or such demand arises from any contract, can never extend beyond the design or intention of the person, who makes the grant. If it was otherwise, he might lose a part of his property, or might be constrained to the doing certain actions, without his own consent. But as all causeless harm done to a man, either in his property or in his liberty, is injustice; and the taking from him his property or the constraining him to act in a certain manner, without his own consent, is doing him causeless harm in these respects; it follows, that there can be no just demand either upon his goods or his person, any farther than he appears, or may be fairly shewn, to have had a design or intention of granting such demands.

The nature and obligation of a loan of in-consumable goods.

VI. We will first consider contracts of partial benefit, which may likewise be called gratuitous contracts, because there is a favour done on one side, and no return of benefit arises from such contracts.

^b If one man makes over his goods absolutely to another, without reserving to himself any claim upon the goods, or upon the party, to whom he makes them over; this is a gift, and does not come within our description of contracts; no mutual obligation arises from such an act as this. In like manner, if we find, that any person has occasion for our assistance, and we do him the service, which he wants, this is no contract; provided no mutual obligation of justice arises from such service. But where our goods are such as will not perish or be consumed in using, we have it in our power to dispose of the use of those goods, without alienating the property, which we have in them: we may let a man have the use of our house, or land, or horses, or books, and still keep our claim to the things

^b Grot. *ibid.*

themselves. When this is done, without taking any valuable consideration of the person, to whom we so make over the use, this is called a loan ; and the act of our lending and his borrowing is a gratuitous contract. The act is plainly gratuitous ; because he has a benefit from the use of our goods, and we receive no benefit in return : and it is a contract ; because a mutual obligation upon the lender and upon the borrower arises from it.

The principal obligation on the part of the lender is to take nothing for the use of his goods. This is all, which is contained in the general notion of a loan : neither the words nor the actions of a man, who says, that he will lend another his house, or his land, or his books, or his horses, or any thing else, which, may be used without being consumed, and who does lend them accordingly, imply any more than this.

There may indeed be some other accidental obligations upon the lender : but they are such as are not included in the general notion of a loan, and can take place no otherwise, than by having been particularly specified. Thus he may, for instance, have expressed particularly for what determinate time he made over the use of his goods : if he has done this, he is obliged not to call for them, and has no right to demand them, till that time is expired.

The principal obligation on the part of the borrower is to return the goods in the same condition, that he received them : except only as far as they must have been necessarily impaired by time or by use, which was granted to him. He is obliged to return the goods again ; because the lender did not design to transfer the property of them to him : and by the general rule of all contracts, the borrower can demand no more than the lender designed to grant. If no time was fixed at first

for returning the goods, it cannot be collected for what time the lender designed to part with the use of them : it must therefore depend upon his pleasure how long the borrower shall use them. But if any time was fixed, when the goods were lent ; the owner then agreed to let the borrower use them so long. However therefore the lender may want them in the meanwhile, the borrower can only be charged with ingratitude, if he refuses to return them. He certainly cannot be charged with injustice, in keeping the use of the goods for as long a time as the other had given him a right to keep them. When the borrower returns the goods, he is obliged to return them in the same condition, in which he received them : because otherwise he would take more than the lender designed to give him. The lender intended to grant only the use of his goods ; but he loses more than this by the borrower, if his goods are returned to him in worse condition than when they went out of his hands.

We ought however to consider, whether the damage, which the goods have received, is such, as they would have suffered, though they had continued in the owners hands, or whether it is such, as they have suffered through some fault of the borrower. In the latter case he is obliged to make good the damage, for the reason already assigned. But in the former case, as for instance suppose the house to be burnt, or the land to be washed away by the sea, or the horses to die of some common distemper, the lender must in justice bear the loss : because if the borrower was to stand to all such hazards, and to make good all accidents, which happen without his fault, and would have happened, though the thing had continued in the hands of the lender ; there would arise from the contract a mutual benefit to the lender ; which is contrary to the

nature of a loan. There is indeed no injustice in bargaining with a man, that he shall ensure our goods from casualties for the use of them: and if he agrees to this, he will be obliged to stand to all damages, as well those, which happen without his fault, as those, which happen with it. But then this contract is not a loan: such conditions as these are not implied in the act of lending; and if we would claim to have them observed, we must take care particularly to specify them.

VII. If a man undertakes to do business for me, without any pay or reward; his proposal of this sort and my acceptance of it is a gratuitous contract, the general name of which is a commission. If the service, which he undertakes to do me, consists in taking the custody of my goods; this particular sort of commission is called a charge.

The nature and obligation of a commission.

In a commission the obligation on his part, who undertakes it is to transact the business without wages, or any other valuable consideration, and to use the same care and diligence in it, as if it was his own. That he is to require no wages or reward for his work, is plain from the nature of this contract, which supposes him to undertake the business gratuitously, that is, to have declared his design of giving his time and trouble to the person, for whom he undertakes it. The only question is what degree of diligence is required of him. The degree mentioned above is the same, that he would make use of in his own business, where it is of the same importance with that, which he undertakes for another man: and it cannot be shewn, that the other has any right to claim a higher degree than this. Every man is supposed to manage his own affairs to the best of his abilities; as far as the matter in hand may deserve or require such management: and there can be no reasonable demand, that he should encrease

his usual care, when he is to manage the affairs of another. But though a higher degree of diligence is not required, yet a lower degree would scarce be sufficient. It is better for us to pay for having our business well done, than to have it managed carelessly for nothing. Whenever therefore we entrust any person with a commission, we must reasonably be supposed to have some ground for believing, that our affairs, when put into his hands, will be well managed: and the most obvious ground, for believing this, is what we have observed ourselves, or have heard well attested by others, concerning his management of his own affairs. Since therefore his prudent management of his own affairs, as far as our observation or intelligence reaches, is the ground of our trusting him; we shew by the very act of trusting him, that we expect he will manage as carefully for us, as he is used to do for himself. And if this is our intention, which is made to appear by our act of trusting him; then he, by undertaking the trust, tacitly engages for this degree of diligence. However, unless there is notorious mismanagement, his kindness entitles him to our favour: it is not reasonable that any man should be a loser by his kindness in undertaking to give us his time and trouble in doing our business for us; and upon this account it is equitable to presume in all doubtful cases, that the damages, which we may suffer in such of our affairs, as are in his hands, have not been owing, to any indiscretion or neglect in him.

The obligation on our part, when such a commission is undertaken for our benefit, is to repay any expences, which he, who undertook it, may be at, and to make good any loss, which he may sustain in his own affairs, upon account of his having engaged in the management of ours. By engaging to give us his trouble it appears indeed, that he intended to give

us thus much; but it does not appear, that he intended to give us more. Therefore by the general rule of all contracts, no more than this is due to us: and whatever he loses more than this, by our means or upon our account, he has a right to demand of us.

A guardian or executor of a will is engaged in a contract of this sort; where he undertakes the trust without being paid for it, or, which amounts to the same thing, where he receives a small acknowledgment, that does not by any means answer his trouble, nor was intended as a sufficient payment. The ward or the heir is not the other party concerned in this contract with the guardian or executor: for he does not undertake the trust at their request or by their appointment. The other party is the testator, who requests and appoints him to be guardian or executor. This appointment was made by the testator before his death, and the contract is completed afterwards by the acceptance of the executor or guardian. Here then it may be asked, since the ward or the heir is not a party in the contract, how comes the guardians or executors demand for such expences, as he makes, or for such losses, as he meets with, to be upon the ward or heir? The reason is, that the guardian or executor, being entrusted with the management and disposal of the testators goods, has a demand for his expences or losses, not upon the person of the testator, but upon those goods, with which he is so entrusted; and by this means the demand will terminate in the ward or heir, who receives the goods chargeable with such demand.

In intestate successions, where the heir is an infant, whoever voluntarily undertakes the management of his affairs, has a like demand. Such inheritances, are indeed introduced by positive laws, and the laws, which introduce those inheritances, commonly take

care to provide both for the benefit of the heir and the security of the guardian. But the claim of a guardian will appear still stronger, if we were to consider this case, as it would stand by the law of nature. The guardian then would have a right to the goods as the first occupant: and if out of mere bounty he should afterwards give them up to any relation of the intestate person, there could be no question of his having a right to such a part of the goods, as would repay him what expences he had made, and would satisfy him for what losses he had sustained, by taking the custody of the whole, till the intestates relation was capable of receiving them.

The nature and obligations of a charge.

VIII. From this account of the obligations, which arise from the general notion of a commission, we may easily understand what are the obligations attending that particular sort of commission, which is called a charge. If I undertake the charge of another man's goods, to keep them safe for him; I engage for nothing but my own diligence and fidelity. Whatever expences therefore I may be at, merely upon this account, he is obliged to repay me. In the mean time I am obliged to use the same diligence in keeping and securing his goods, that I would make use of in keeping and securing goods of the same value, if they were my own.

Upon this principle it will sometimes happen, that I ought to preserve his goods, rather than my own; not because a greater degree of diligence is due to him than to myself; but because his goods may be of more value than any which belong to me; and I am to use the same diligence in preserving his goods, that I would use in preserving my own, if they were of equal value. Thus if I have a chest of gold or of deeds belonging to another man in my custody; I might be

obliged, in case of fire, to secure those treasures, rather than any of my own common furniture.

On the other hand ; if attempts have been made to break open my house, whilst I have the treasure of another man in my keeping, and I am therefore forced to hire a guard, not for the sake of securing my own common goods, which are not likely to have been the temptation ; as this expence is undertaken upon his account, he is obliged to pay the wages of the guard.

There can be no question, whether the nature of this contract allows me to make use of goods, which are thus deposited in my hands, and which I undertook to secure. They were plainly lodged in my hands for the owner's benefit, and not for mine : they were to be kept for him, and not to be used by me. Neither can I claim the use of them, in return for my trouble in keeping them : if I had designed such a thing, I might have mentioned it at first ; and then, if he had consented to it, I might have claimed the use of such goods so deposited with me. But in the mere act of undertaking a charge, no such claim is understood : the act in its own nature is beneficial to the owner of the goods only, and is gratuitous on my part ; unless I have taken care to make any express reserve to the contrary.

Indeed where goods will not be at all the worse for using, as for instance if I have a piece of plate in my custody and only set it on my sideboard for ornament ; the owner might be thought too strict, if he complained of me for making such a use of his goods. However my charge has certainly given me no right to use his goods, even for such purposes as these. And if by thus letting it be publicly known, that I have goods of value in my hands, the future custody of them should become more expensive to me, than it otherwise would have been ; I do not see with what justice I could require him to bear

these extraordinary expences, which I have brought upon myself, by doing what I had no right to do.

Contracts
of mutual
benefit, ei-
ther share
the matter
or make it
common.

IX. ^c Contracts of mutual benefit are either simple or mixed. Simple contracts of this sort are either such as share the matter of them between the contracting parties, or such as make it common to the parties.

Such contracts, as share the matter of mutual benefit between the parties concerned in them, may be distinguished into three sorts agreeable to the third general division of contracts, which has already been taken notice of. The only ways of benefiting one other are either by giving things in exchange for things, or secondly by doing useful services in return for useful services, or lastly by doing useful services in exchange for things.

This division of contracts will be better understood by applying it in some few instances. We will begin with bartering. This is a contract of the first sort in which goods are given on one part for goods given on the other part. The contract does not unite the goods into one common stock, but all the goods on each side being considered as the matter of the contract, it shares or divides this matter between the parties concerned in it. Bartering may be considered in two different views. This contract could not be very like buying and selling, before the invention of money. Goods might then indeed be exchanged for goods, as horses for oxen, or sheep for corn : but there could be no other way of comparing them with one another no measure of the price of them on either side, but what was taken from the use which one party might have for the goods of the other. If one person had many sheep but no grain, and another on the contrary had much grain but no sheep ; each of them would make his own want of the others goods the measure by which to determine what quantity of his own he would be willing to give for what quantity of the others.

But since the invention and use of money ; bartering approaches so near to buying and selling, that there is scarce any difference between them : in the exchange of goods for goods, the goods on both sides are valued in money, and are compared with one other by this standing measure. If a man exchanges sheep for oxen, or wool for wine ; he does not determine how many sheep he will give for an ox, or what weight of wool he will for a hoghead of wine, by considering how little he wants the sheep or the wool, and how much he wants the ox or the wine : but he estimates the value of the goods on both sides in money, which is the common standard of price.

There is another contract of the same sort, to which the name of exchange is appropriated, a contract of giving money for money, I do not mean, when money is given for a medal or some scarce coin, which is matter of curiosity ; for this is buying and selling : but when current coin of one sort is given for current coin of another sort, as gold or silver coin for copper coin, or when current coin of any sort is given in one place for current coin of any sort to be paid in another place ; as when I give a man a certain sum of money at my own home, and he is to give me, or to pay for my use, a certain sum of money in London or Paris.

Giving cash for bills cannot be strictly reduced to this head : because he, who gives the cash and takes the bill, gives something more than the cash : he gives his trouble in negotiating the bill, and runs some hazard if the several parties concerned in the bill should become insolvent, whilst it is in his hands. So that, if we consider the bill as money, he for this money gives his own money and his work besides, and does likewise in some sort insure the bill.

The contract is still of the same sort, when money is given for goods; and the name of this contract is buying and selling. The money and the goods are the matter of the contract; and the contract shares this matter, or divides it, between the parties concerned, and gives each of them property in his particular share.

Of the same sort are those contracts, in which the use of goods is given for the use of goods: as if, for instance, a person has the use of my house in town, and I, in exchange, have the use of his house in the country. The use of the houses is the matter of the contract; and it is the business of the contract to share this matter between the parties, and to adjust their respective claims upon it.

In like manner the use of goods may be given for money: This contract is still of the same sort, and is called letting or renting. Nor is it a different contract when the use of goods is given for goods, as when I let my estate, and bargain to receive the rent of it in cattle, or wheat, or malt.

It is not possible to reckon up the several contracts, which share the matter between the contracting parties, and fall under the second head of contracts, whereby useful services are exchanged for useful services. They are as numberless as the actions are, by which one man can promote the pleasure or profit of another. In general we may observe, that in all these contracts the work or service on both sides is the matter of the contract; and that the effect of the contract is to assign to each party the work, which he is to do, and to give the other a claim upon him to do it. Contracts therefore, which are purely of this sort, so that things are in no respect any part of the matter of them, are mutual alienations of liberty: each party obliges himself to do some work for the benefit of the other, or each party gives the other a demand upon his person.

Under the third head, where things are exchanged for beneficial services ; though the beneficial services, which may be performed, are numberless, yet the things, which are given for such services, must be goods either moveable or immoveable, or money, or the use either of goods or of money. The beneficial services and the things to be given for them are the matter of such contracts : and the effect of the contract is to assign each party his share of this matter, or to settle what things one of the parties shall have a right to claim, and what services in return the other shall be entitled to. When money is given by one party in consideration of the other party's undertaking to preserve his goods from accidents, it is called insurance. When money is given for common or daily work it is called letting and hiring.

The second sort of contracts of mutual benefit are such as make the matter common to the parties concerned in them, or give the contracting parties a common claim to it. The general name of all contracts of this sort is partnership : and the matter of them may be either things or actions or both. When two or more persons join money, or goods, or labour, or all of these together, and agree to give each other a common claim upon such joint stock, this is a partnership.

All wagers, or gaming of any sort, come under the notion of partnership. The stakes, that is, the money or goods laid down on each side, are a joint stock, upon which the parties concerned in the wager or game have a common claim, till the wager is decided or the game is over. This partnership was originally intended to be of no longer continuance : the parties agreed from the first, that some uncertain event should put an end to it in such a manner, that, when it ends, the stock, which was in common before, shall not be divided, but shall become the sole property of one of them.

Lots indeed are made use of in other instances, where there is no partnership, and no such common stock: but then in these instances there is no contract. If a nation should determine itself by lot in making choice of judges, in the assigning of provinces, or in the disposal of any other offices, this is no contract; it is only the method, which the public fixes upon for chusing one out of many competitors, in order to avoid the ill will of those, who are disappointed: and the right, which the fortunate competitor has to his office, does not arise from any other contract, but the appointment of the public.

Incapacity of either party to be obliged voids a contract.

X. Contracts are, in some respects, subject to the same rules with promises: all the parties contracting must have the use of their understanding and of their will, or otherwise the contract will be void. I say all the parties must have these qualifications: because, as a mutual obligation of the parties on both sides is essential to contracts, where one of them is under any incapacity of obliging himself the other cannot be obliged. In what manner fear or error affects a contract will appear from taking a more particular view of the equality naturally required in all mutual contracts.

What the equality required in contracts consists in.

XI. ^d It has been shewn already, that neither of the parties in a contract can claim any right by virtue of it, which the other does not consent to transfer to him. And it appears from the nature of contracts of mutual benefit, that neither of the parties has, or can be supposed to have, any design or intention of transferring any right to the other without receiving an equivalent. From hence it follows, that, when either party has received more, than he has given an equivalent for, he has received what the other never designed or consented should be his: and consequently, as he has no claim to what he has so received; the con-

^d Grot. *ibid.* § VIII.

tract is either void or must be corrected, that so he, who has too little, may either have his own again, or else may have amends made to him.

It may indeed be said, when I have bought goods, and have paid the money for them, that, by my act of parting with my money and taking the goods, I plainly shewed my consent to transfer my property in the money to the seller, upon condition of his transferring his property in the goods to me. But the answer to this is obvious: in buying and selling, it is well known, from the very nature of the contract, though our words may not express so much, that neither the buyer nor the seller intend to give each other any thing, as matter of mere bounty, but only upon supposition of each receiving an equivalent for what he gives. If therefore I buy goods; I transfer the property in my money to the seller, upon supposition, that I receive an equivalent for what I so transfer, and not otherwise. So that if this supposition fails, if I do not receive an equivalent, the condition fails, upon which alone I consented that the money should be his. For this reason, though he may be in possession of the money, he has no right to it: he can have no right to it, unless I consented to give him such right; and I never consented to give him such right, but under the condition just now mentioned. In like manner, if I hire a house or lands, that is, if I purchase the use of them; my intention, according to the nature of this contract, is, that I will give the owner nothing without receiving an equivalent for it. There is nothing of mere bounty in contracts of this sort; each party designs to receive as much benefit, as he gives. Whatever rent therefore the owner of the house, or land receives of me, I consent to make it his, upon supposition that I receive the value of it in the use of his estate. If then this supposition fails, though he

may have gotten possession of my money, it is not his ; because it cannot be his without my consent, and I consented to make it his, only upon supposition of my receiving an equivalent, which I have not received. The same reasoning may be applied to other contracts. If I hire a man's work or service ; this is not matter of favour or bounty on either side. The nature of the contract shews therefore, that I design to receive an equivalent for his wages, which I am to give him : and consequently that I consent to make the wages his, or to give him property in my money, only upon this condition. Unless then I do receive an equivalent for my money, the condition fails, upon which alone I consented to make it his : and upon that account he has no claim to the wages, for which we bargained.

Now in order as far as may be to secure an equivalent to each party, in contracts of mutual benefit ; it is necessary, that they should treat with one another upon an equal footing ; and their thus treating upon an equal footing is what we call the equality required in contracts. This equality relates either to the acts or to the matter of the contract. The acts, in which equality is required are either those which are previous to the contract, or the principal act of contracting.

Equality,
in the
previous
acts, re-
lates to
know-
ledge and
freedom.

XII. ° Before the contract is entered upon, it is previously requisite, that each party should be equal to the other in knowledge, or that whatever faults one of them knows of, in the thing or the service, which they are about to bargain, he should discover them to the other. For any fault in the matter of the contract, which either party designedly concealed from the other, will make the contract void, by preventing the other from receiving his equivalent.

You sell me goods at a certain price, which would indeed be the true price of the goods, provided they

had no concealed faults, but you know that they have such faults, and do not discover them. The goods then are not worth the price which you set upon them : and as I designed to give you such a price for them, only upon supposition of their being worth it ; I transfer the property in the purchase-money to you, only upon this supposition : and consequently, as this supposition is a condition of the transfer, there is no transfer at all, unless the supposition is true ; and if you keep the money, you keep what is not your own.

How far common practice in buying and selling may have prejudiced you against this conclusion, I cannot tell. However to shew you the reasonableness of it, I will apply it to a similar instance in another sort of contract. I hire you to do some particular work ; you, at the time of letting yourself, labour under some distemper or other infirmity, which you conceal from me, so as to be disabled by it from doing the work for which I hire you. It will, I imagine be allowed, that, as soon as I discover you to be disabled, the bargain will be void ; that you have no claim to the wages, for which we bargained ; and that, if I paid you them beforehand, you ought in justice to return them. What then is the reason why you have no claim to these wages ? is not it because your work is not worth what I supposed it to be worth, and consequently in this contract I cannot receive my equivalent ? If this conclusion is well grounded, when I purchase your work, what should make it doubtful, when I purchase your goods ? If you have imposed upon me, by concealing their faults, and they are not worth what I give for them ; you have then no more right to the purchase-money, than you would have had to your wages, if I had hired you for work, and by any concealed weakness you were disabled from doing that work. You will say perhaps, that in letting out your ser-

vice, you bargain for so much work, and consequently, that, if you cannot do the work, the bargain is void ; because you fail of performing your part of it. And I may reply, that in selling your goods for such a price, as they would have been worth, if they had been free from the concealed faults, you bargain for goods of such a value, and consequently, that if the concealed faults make them of less value, the bargain is void, because you fail of performing your part of it.

When the parties are equal as to their knowledge of the faults, either of goods to be purchased, or of the use of goods, or of beneficial services to be hired ; and the purchaser or hirer is willing, notwithstanding what he knows about the matter of the contract, to enter upon a bargain ; these faults, which are so known, cannot afterwards be a sufficient reason for setting the bargain aside.

We have hitherto supposed the inequality, as to knowledge, to be on the side of the purchaser or hirer, and have shewn by what means such inequality will make the contract void. But it is to be remembered that a like inequality on the side of the seller or letter will have the same effect, for the same reasons.

If I know of advantages or perfections in a man's goods, which he is ignorant of, and when I am about to bargain with him for those goods, or for the use of them, conceal from him what I know of the matter, and so give him less for what I purchase of him than the thing is worth ; I have no more right to the thing so purchased, than he in the opposite circumstances would have had to my money.

As it is requisite previously to the contract, that the parties should be equal as to their knowledge of the faults or excellencies of the thing, about which they are going to bargain ; so it is likewise requisite, that they

should be so far equal as to their freedom of choice, that neither of them ought to make use of any unjust threatenings to force the other, through fear, to contract or bargain with him. In such an inequality as this the party by an act of injustice hinders the other from receiving his equivalent: and no act of injustice can give him a right to the difference.

If the fear of one party was just, or if, though it was unjust, it arose from some other quarter, and was not at all owing to the party, with whom he bargains, I should then determine otherwise. Because, though the person, who is in such fear, does not receive his equivalent in the special matter of the contract, such as the goods purchased, or the work hired; yet he receives the difference in being relieved from his fears: and there is no injustice, on the part of him, from whom such relief comes, there is nothing to hinder him from claiming the difference.

XIII. ^f In the principal act, which is the very act of bargaining, it is requisite that the parties should again be equal in their knowledge, as to the true price of the goods, or the use, or the service, about which they are bargaining; so that the purchaser may not impose on the seller, by under-rating the thing to be disposed of; nor the seller, on the other hand, impose on the purchaser, by setting too high a price upon it. If the seller, by being better informed about the true price of the thing, than the purchaser is, should obtain more for it, than it is worth; or if on the other hand, for want of this equality in knowledge, the purchaser should give him too little; in either case one of them has not received his equivalent: and this want of an equivalent on either side is sufficient to make the contract void, for the reason so often alledged already: the party, who has received too little, intended to

Equality in the principal act relates to knowledge of the price.

^f Grot. *ibid.* § IX.

transfer his right in the thing, which he is disposing of, only upon supposition of receiving what is of equal value; his right in it therefore being transferred upon this supposition, and not otherwise, the party, who has not given him an equivalent, has gained no right by the bargain.

That a knowledge of the intrinsic faults or excellencies, in the matter of a contract, is different from a knowledge of the true price; or that what Grotius calls equality in the acts previous to the bargain, is different from what he calls equality in the principal act of bargaining, will appear presently, when we come to consider by what means the price of goods or labour is varied, and to shew, that though the particular intrinsic faults or excellencies of the matter may and do make a difference in the price; yet there are many other causes, which will vary it, where those faults or excellencies are out of the question.

Grotius, when he is treating about the equality required in contracts, proposes to examine a question, which Cicero has started, concerning a merchant, who had transported corn from Alexandria to Rhodes, at a time when the Rhodians were in great want of it, and corn sold very dear at their markets. The merchant is supposed to know, at the same time, that a large fleet of merchant-ships laden with corn, were actually in their way from the same port, and destined for Rhodes. And the question is, whether, as the knowledge of this circumstance would have made the markets fall, he was obliged to discover it to the Rhodians, or whether he might take the advantage of their ignorance, and sell his own corn at a better price, than it would have brought, if they had known, that so large a supply was near at hand. Grotius determines, that, whatever kindness or bene-

volence might suggest to him, he might consistently with justice conceal this circumstance: because though the seller is obliged to discover all the faults, which he knew of, and the buyer did not know of in the goods themselves, yet there is not the same obligation upon him to discover all the accidental circumstances relating to them. But it seems very difficult to find out the difference between these two sorts of concealment: there appears to be the same want of an equivalent on the side of the buyer, when the seller takes more of him than the goods are worth, whether this advantage is made by concealing any intrinsic fault in the goods themselves, or by concealing any accidental circumstances, which would lessen the value of them to the buyer.

In fact, if Grotius had examined this question under its proper head, he would have determined otherwise upon it, than he has done. He examined it, when he was considering the requisite equality in their knowledge of the contracting parties, in those acts, which go before the contract: and as this equality respects only the intrinsic faults of the goods themselves, it certainly does not include an equality in their knowledge of any accidental circumstances. But the proper place for examining this question is, when we are considering the equality of knowledge, which is required in the principal act, or in respect of the true price of the goods. For if it is necessary, that the price should be a fair one; it is necessary likewise, that each party, in order to judge whether it is a fair one or not, should be equally informed about all the accidental circumstances, upon which the true price of the goods depends. And if the merchant asked as high a price, when he knew of the supply, that was coming, as he would have asked, if there had been no such supply near at hand, he knowingly asked more than, in those circumstances, his goods were

worth, and more than the purchasers would have given him, if they had known as much as he did. The purchasers therefore, if they gave him his price, did not receive their equivalent; and this is inconsistent with the nature of all contracts of mutual benefit.

Equality in the matter relates to faults in the goods; or errors in the price unknown to either party.

XIV. § But suppose the buyer and the seller to have dealt fairly with one another, both in the previous and in the principal acts, suppose them to have been so far equal in their knowledge, as that neither of them has concealed any intrinsic faults, which he knew of in the goods, nor has designedly rated them either too high or too low; yet still there may be an inequality in the matter of the contract; there might be faults in it, which neither of them knew of, or they might either of them set a false price without designing it. By this means one of the parties will not receive his equivalent: and as he parted with his own right in the money or goods, and transferred it to the other, only upon supposition of receiving an equivalent; upon failure of this supposition nothing is done; he has parted with no right, and consequently the other has gained none by the bargain.

Want of an equivalent how supplied in auctions.

XV. There are indeed some ways of buying and selling, as by auction or inch of candle, in which the want of an equivalent on either side will not affect the contract. But then this want is provided against by a tacit agreement of the parties beforehand. He, who puts his goods up to auction, signifies by so doing, that he will get as much for them as he can; whilst they, who bid for the goods, tacitly consent to his proposal. And though, in some particular bargains, he may perhaps receive too much; yet it is supposed, that upon the whole this equality will be made up: because as his intention is to get as great a price, as he can; so he is understood to signify at the same time, that he will be satisfied with as little, as the purchasers choose to give.

XVI. ^h As one part of the equality required in contracts relates to the setting a fair price upon the things or the work, that are to be disposed of by them; it may not be improper, before we go on to the farther consideration of contracts, to say something concerning the notion of price, and the variations of it.

Price of things or work, what it is, and how varied.

The price of things is their comparative value in respect of one another.

The wants of mankind, either real or imaginary, are the foundation of the price both of things and of labour. Such things, as no person either really wants, or fancies himself to want, will have no value at all, and consequently can have no relative value in comparison with other things.

Now since the want, that mankind have of a thing, is the true cause of its having any price at all; the price of things must necessarily vary as the want of them varies: in proportion as mankind want them more or less, their price, that is, their comparative value in respect of one another, will be greater or smaller. We will first consider how the price of things varies, where mankind are in real want of them. Things are more or less wanted in proportion as they are more or less useful. Upon this account, if all other circumstances are equal, things, which are the most useful, will bear the highest price, and things, which are the least useful, will bear the lowest.

But then our want of such things, as are of real use to us, does not rise or fall in proportion to their usefulness only, but in proportion likewise to the difficulty of obtaining them. For where two things are equally useful, or equally necessary, so that in this respect our wants of them both are equal; yet in another respect our wants of them will be greater or less in proportion to the difficulty or ease of obtaining them: because,

^h Grot. *ibid.* § XIV.

where the usefulness of a thing is given, our want of it will be greater or smaller in proportion as we feel that want more or less: and those wants are felt the most, which are of the longest continuance, and those are felt the least, which are of the shortest. But since that want, which is the most difficult to supply, will commonly continue the longest, and will therefore be felt the most, it is upon this account the greatest; whilst another want, which may in itself be equal to the former, but is the most easy to supply, will commonly pass off the soonest, and being therefore felt the least, will for this reason be the smallest. But the comparative value or price of things rises or falls in proportion as our wants of them are greater or less. Therefore where things are equally useful, those, which are most difficult to be procured, will bear a higher price, than those, which may be procured more easily.

The difficulty or ease of procuring a thing depends upon two circumstances; first upon the scarcity or plenty of the thing itself; and secondly upon the greater or smaller number of persons, who want it at the same time. In a certain number of purchasers, if there is great plenty of a thing, it is easily procured, and this will make it cheaper; if there is not much of it, we shall find some difficulty in procuring it, and this will make it dearer. Where only a certain quantity of a thing is to be had, there will be more difficulty in procuring as much of it as we want, when a great number want it at the same time; and this will raise the price of it: if there are fewer, who want it at the same time, those, who want it, may be more easily supplied, and this will bring the price of it down lower.

Upon the whole then, the want of a thing is the foundation of its price; and consequently the price will vary as the want varies. But either the want, or the

price in consequence of the want, will depend partly upon the usefulness of the thing, and partly upon the difficulty of procuring it; and this difficulty depends partly upon the quantity of the thing, and partly upon the number of purchasers, or, which amounts to the same, upon the demand that there is for it.

What has been said of the price of things, may be applied to the price of labour; in order to shew, that the comparative value, which is founded in the want, that we have for it, will depend ultimately upon the usefulness of such labour, upon the number of hands, that may be procured, and upon the demand, that there is for it. In proportion as the use of it is greater, as there are fewer hands to be procured, or a greater demand for what hands are to be gotten, the price of it will be higher: and so, on the contrary, in opposite circumstances the price will be lower.

In the purchase of goods, which have been manufactured, the price depends partly upon the price of the materials, out of which they are made, and partly upon the price of that labour or work, by which they are manufactured. But here again it is the want of such goods, and consequently of such materials, and such workmanship, that is the original foundation of their price; and in what manner this want will vary their price has been seen already.

Under the head of real wants we include what is necessary for the support and common convenience of mans life, according to the rank or station, in which each person is placed; as food, cloathing, a dwelling, bedding, education, medicines, &c. But there are other wants, which we may call ordinary ones: and under this head we include whatever may administer to a man's needless, but innocent, pleasure or entertainment; as paintings, statues, plate, jewels, &c. These wants be-

ing presupposed, the price of such things as will supply them, or of the labour, which must be employed about those things, is varied in the same manner and in the same proportion with the price of such things, as are necessary to supply our real wants, and of such labour as is of real use. Things of this sort will be dearer, as the taste for them runs higher, that is, as their supposed usefulness is greater; or as they are more difficult to be procured; that is, as the want of them is more felt: and the difficulty of procuring them will be greater, as the quantity of them, which can be had is less, or as there are more persons, who want them at the same time.

Grotius amongst other circumstances, which encrease the price of things, reckons the trouble or expence of the merchant, who procures them; for which, he says, allowance is to be made in the price of the goods so procured. But those two circumstances are not distinct from what has been mentioned already, and may easily be resolved in one or other of them. If the merchant is at any expence, besides paying wages to those, who are employed in procuring them, which wages are the price of labour; such expence is a part of the original purchase-money, which he paid for them. And to say that allowance is to be made to him for expences of this sort, is no more than saying, that as he buys dearer, he must sell dearer. But what makes him buy dearer, unless it is either the usefulness of the goods, or the difficulty of procuring them, which difficulty depends upon their scarcity, or upon the demand that there is for them? so that at last, if the price of his goods is high, it is for one of the reasons already assigned.

Fair
price is the
market-
price.

XVII. None of these particulars, upon which the price of things or of labour depends, can be reduced to any mathematical certainty. It is impossible to deter-

mine with exactness the comparative degree of their usefulness, or of their scarcity, or of the demand, that there is for them. The price therefore neither of goods nor of labour can be so precisely settled, as to allow of no latitude. No one can say, that this, or that, is so exactly what they are worth, that if the seller takes more, he takes too much ; or if the buyer gives less, he gives too little. The general rule of price is what we call the market price, by which we mean the price, that men, in that place, at that time, and in those circumstances, are commonly willing and have been used to give. But this is a very lax rule ; and the price of things or of labour, when adjusted by it, may well admit of these three degrees, the highest price, the lowest price, and the moderate or middle price.

Civil laws indeed frequently interpose, and fix the price both of goods and of labour : and when their price is thus fixed, whatever exceeds that measure is too much, and whatever falls short of it is too little.

XVIII. There are some extraordinary circumstances, which may reasonably allow us to fix a higher price upon our goods, than the market-price. But even these extraordinary circumstances may be reduced to one of the principles already mentioned, the usefulness, under which I include the imaginary as well as the real uses, the scarcity, or the demand.

Extraor-
dinary
circum-
stances
allow to
exceed the
market
price.

These principles appear in numberless shapes ; and in whatever shape they appear, they vary the price of goods. You have goods, which you want to dispose of, and which I have no occasion for ; but to oblige you, I am willing to buy them. It is plain then, both that they are of no great use to you, because you desire to part with them, and that they are of no great use to me, by the supposition of my having no occa-

sion for them. In this situation I expect to buy them at a lower price than ordinary : and the reason, why I should buy them so, is the small use of them either to the buyer or the seller.

You have goods, which are very useful to you, and which would likewise be particularly useful to me : and you sell me these goods merely to oblige me. There is, by the supposition, some extraordinary usefulness of the goods both to the buyer and the seller ; and upon this account you set an extraordinary price upon them.

You have an estate, which came to you from your ancestors, and this circumstance makes you fond of it ; the possession of it gives you more pleasure, than if you had acquired it any other way. A particular fondness of this sort is indeed but an imaginary usefulness ; but it is such an one, that, if I want to buy the estate, you have no reason to part with it, unless I am willing to give you a higher price, than you would have asked otherwise, or than the estate would have been worth, between buyer and seller, if it had not been attended with this circumstance.

If you could have made any particular advantage of your goods by keeping them yourself, or if you shall suffer any particular damage by parting with them ; then, besides the ordinary price, you expect to have this advantage or this damage made up to you ; and upon this account you ask an extraordinary price for your goods. Here again the price is raised by the particular usefulness of the goods to you.

It is some loss to you, if I delay the payment of the purchase-money, when I buy your goods : for till the payment is made you have no use of the money. Such delay of payment therefore is a reason for your selling your goods dearer, than if I had made prompt pay-

ment. Money paid sometime hence is not so useful to you, as money paid just now would be : what therefore is wanting in the usefulness of money so paid, must be made up in the quantity of it.

XIX. In bartering, where goods are to be compared immediately with goods, there is more difficulty in adjusting the price, than in buying and selling with money : because in such bartering the value of the goods on both sides is to be estimated. Whereas in buying and selling for money, the value of the money is already settled ; and nothing is to be estimated but the comparative value of this standard and the goods, which are to be purchased. My meaning is, that such goods, as are not frequently exchanged for one another, will be uncertain in their price : but money, which is in constant commerce, and is exchanged every day for goods of all sorts, will by such use have its comparative value so well settled, that we may without much difficulty, upon every occasion, not only determine how much goods we ought to receive in exchange for how much money, but may apply it as a common standard or measure to compare the value of goods of one sort with the value of goods of another sort. This we may reckon as one of the advantages arising from the introduction of money : the constant use of it in exchange makes it a standard of price, by which the comparative value of goods is more readily adjusted than it could have been otherwise.

Advantages by the introduction of money.

A second advantage arising from the introduction of money is, that by the help of it we may commonly procure such things, as we want : whereas, if all our riches consisted in goods ; though we had great plenty of one sort, we might want those of another sort, without being able to get them in exchange. I might have great plenty of corn ; but if I had occasion

for sheep or oxen, though you had plenty of them, you might not be willing to barter them for my corn : because you might have more corn of your own already, than you wanted. In the mean time you might have occasion for wine, and would be glad to exchange your sheep or oxen for it, if I had any. But as I have none, I am forced to keep my own corn, and cannot procure for it what I want, and what, if I had any goods, which would suit your convenience, you would supply me with : in the mean time you are subject to the same inconvenience ; if they, who have wine to spare, have no occasion for sheep or oxen. This inconvenience is remedied by the use of a current standard, which all men are ready to take one of another. Though you would not part with your sheep or oxen for my corn, because you do not want it ; yet you will readily part with them for my money, as you know, that they, who would not let you have wine for sheep or oxen, will let you have it for this money, which they can pass off again in the same manner, and procure in exchange for it such things as they want.

A third advantage arising from the introduction of money is, that it lies in a little compass, and is therefore better fitted for commerce than bulky goods would be. I have great numbers of cattle, and should be willing to exchange them, if I could, for wine : but no person near me has any to dispose of ; perhaps none is produced in the country where I live. If then I would have it, I must go from home for it : and it would be vast trouble, if indeed it was possible, to drive or convey my cattle to such a distance. But money lies in a less compass, and is easily carried from place to place : it will therefore make the exchange much easier to me. Though I could not convey my cattle so far, I can get money for them nearer

home, and can easily convey the money to the place, where I want to make the purchase of wine.

As it is one advantage arising from the introduction of money, that a great value lies in a narrow compass; so we may reckon it a fourth advantage, that we can reduce it into parts, which are of small value, much more readily than we can most sorts of goods. I have more horses, than I want, but have occasion for a sheep, which is worth much less, than any one of my horses. I cannot therefore get what I want, but at a great disadvantage: because I have nothing to give in exchange for it, but what vastly exceeds it in value. The introduction of money has removed this inconvenience. Though I could not divide the horse, so as to give no more, than the sheep is worth; yet I can, when I have sold him, divide the money, and procure what I want, without giving too much for it.

A fifth advantage arising from the introduction of money is, that we may keep it more easily than we could have kept most sorts of moveable goods. When we have taken it in exchange, there is no danger of its wasting or perishing in our hands, before we shall have occasion to part with it again. Cattle would die; fruit would rot; corn, or wine would spoil: but money may be kept for any length of time without being the worse for it.

XX. If the advantages, which I have been mentioning, were proposed in the introduction of money, we may easily determine what materials are the most proper to make it of. As it is designed to be the standard of price, a common measure by which to compare the several values of other things with one another; the materials, of which it is made, should be as steady, as possible, in their own value; the use-

Metals
the most
proper
materials
for money.

fulness of them, their scarcity, and the demand for them should be as little liable to variation, as may be.

Secondly; money is intended to be current amongst all those, who have any intercourse of commerce with one another, so that any person will readily take it in exchange for such goods, as he can spare; because he knows beforehand, that others will take it in like manner of him again: for this reason the materials, that it is made of, should be such, as in the opinion of those, who have such intercourse, have some usefulness and consequently some value, either real or imaginary. Paper or leather, or any thing else, which has no such intrinsic value, either real or imaginary, will be current no farther, than the credit of the person goes, who vents them, and makes himself answerable to take them at any time in exchange: nor will they be current even so far, unless he makes himself answerable likewise to exchange them for what will be current with every body. Suppose a man to circulate bills, which were payable by him upon demand, but were to be paid when demanded, in corn, or in wool: those bills would not be current, as far as his credit would go: all persons, who might otherwise be ready to trust him, would not be willing to take such bills in exchange: no one indeed would take them, who might possibly not be able to exchange them with any body, besides the first drawer of the bills: because no one would care to be forced to take corn or wool, at a time perhaps when we may have no occasion for any, or may not know how to dispose of any, if he had it. If those bills were payable in money by the drawer, then indeed such bills will pass with all persons, who know they may depend upon his promise to take them again. Such is the necessity that the current exchange amongst private persons should be carried on

with such materials, as have in themselves some real or imaginary value. The authority of civil government will reach something farther; it will be able to circulate useleſs materials in common exchange, as far as its jurisdiction extends. The ſubjects of the ſame government, in their contracts with one another, may be forced by the laws, or where the government has the right of coining, and will vent only baſe money, they may be forced, by the neceſſity of the caſe, to take ſuch money in the courſe of their common dealings. But then foreigners, who are not under the ſame jurisdiction, nor under the ſame neceſſity, will not take their money; becauſe it is worth nothing to them. Nor will ſuch foreigners take bills upon the credit even of the government; unleſs thoſe bills are payable in ſuch materials, as are worth ſomething in themſelves, and ſuch too as they can circulate again upon account of ſome intrinsic value either real or imaginary.

Since a third advantage, propoſed by the uſe of money, is, that what will fetch many goods in exchange may lie in a narrow compaſs, the materials, of which it is made, ſhould be ſuch, as have in themſelves a high value, either upon account of their great uſefulneſs, or their great ſcarcity. Such materials, as have both theſe qualities, would not be proper for the purpoſe. A ſufficient quantity of what is very uſeful, if it is likewise very ſcarce, could not be ſpared from the common occaſions of life to be applied to the ſole purpoſe of exchange: becauſe as much as is applied to this purpoſe becomes uſeleſs to other purpoſes. And certainly ſuch materials, as have only the quality of great uſefulneſs, but are at the ſame time very plentiful, will be of too ſmall value to anſwer this deſign of introducing money, which we are now ſpeaking of. The beſt materials therefore are ſuch as have little real uſefulneſs in themſelves, and have their chief intrinsic

value given them by some imaginary usefulness only ; such as mankind can do very well without, but such as common opinion has made them desirous of having. Materials of this sort may be spared from the common uses of life to make money of. And if their value is raised very high, by the scarcity of them ; such a quantity of them, as will lie in a narrow compass, will fetch many goods in exchange.

A fourth advantage, designed by the introduction of money is, that it may be reduced into such small parts, as to be exchanged without disadvantage for things of small value. It is proper therefore to use materials of different sorts, some of greater some of lesser value: because as the last-mentioned use of money requires, that some should be made out of very dear materials, though the same materials might be made into pieces some greater and some lesser, yet the lesser pieces would either be of too great value to be exchanged upon fair terms for cheap goods, or else they would be so small as to be in danger of being lost.

The fifth advantage proposed by the introduction of money is, that it will keep without wasting or spoiling ; so that he, who takes it in exchange, is in no danger of having it perish in his hands. And in view to this advantage it is plainly requisite, that money should be made of such materials, as will not easily wear out, and as are not subject to perish or to be damaged by keeping.

ⁱ Metals, some of them at least, as gold or silver, will answer most of these purposes. Their intrinsic usefulness is not very great at any time ; so that there is no danger of any such variations in this usefulness at different times, as will make their value uncertain ; and the plenty or scarcity of them is at all times much the same, unless some very unlikely or unforeseen acci-

ⁱ Grot. *fbid.* § XVII.

dent, such as the discovery of the west indies, should make an alteration: and as the value of them is imaginary rather than real, the demand for them will commonly be much the same. But then this imaginary value being almost universal, they will be readily current every where in exchange for goods. And as it is high at the same time, a small quantity of them will bear a great price, or what is worth much will lie in a narrow compass. As this high value arises from opinion and scarcity, rather than from any real usefulness of them; what is wanted to carry on commerce may be made into money, without depriving mankind, in any degree, of what they want to use for the purposes of common life. And we may observe by the way, that if iron was as scarce as gold, it would not be so proper for the materials of money; notwithstanding the very high value, which its known usefulness and its supposed scarcity would give it: because, if so little of it was to be had, by making money enough out of it to maintain a general commerce, more of it would be taken from the uses of common life, than could be well spared. But gold and silver alone will not answer all the designs of introducing money: their value is rather too high: pieces of these metals, if they were small enough to exchange, without disadvantage, for small quantities of cheap goods, would be in danger of being lost: and upon this account it is necessary to make use of some baser metal, such as copper, for pieces of smaller value. Any metals may pass from hand to hand without wearing out, and may be well enough kept, as long as we please, without being the worse for it: but gold and silver are the best upon this account, as well as upon others; because they are less hurt by keeping than the other metals are.

Uses and
rules of
coining.

XXI. After mankind have been led by such reasons, as we have been mentioning, to fix upon metals, as the standard of price, and the current matter of general exchange; it is plain, that without the aid of civil laws, the different value of this or that piece of any metal, as of gold for instance, can depend upon nothing but the different quantity contained in the same piece, or upon what is the same in effect, the different weight of it. If a certain quantity of bullion is, in the course of exchange, worth two sheep, any civil legislator may order, if he pleases, that all persons under his jurisdiction, shall take the same quantity of metal, after it is coined, in exchange for six sheep. But this rule will be of force no farther, than his jurisdiction extends: foreigners who are free from his authority, will not regard such a law, and will estimate his coin only by the weight of it. And as in coining there must be some alloy or mixture of baser metal, they will have a regard to this too, and will estimate a given weight of the mixed metal by its fineness; that is, by the true weight of pure gold in the coin.

However, as there would be much trouble and much time lost in weighing the metal every time it is exchanged, there is a great convenience in signifying by some stamp, upon every piece of metal designed for exchange, what the weight of that piece is. And this convenience gave occasion to the coining of metals.

Indeed as there is some trouble and time saved to the trader by having every piece of metal, which he is to receive, so stamped; it is but reasonable, that he should make some allowance for this convenience. So that a piece of money, when coined, is worth something more, than the same quantity of bullion would be. This difference ought not to be greater, than

what may answer the convenience of the trader : because no one can be expected, or would be willing, in the course of exchange, to pay for more. An allowance for such a difference as this is reasonable on both sides ; the coiner expects it, that he may be paid for his trouble ; and the receivers, one after another, are willing to pay it, upon account of the convenience already mentioned. The coiner may indeed use more art and labour, than is necessary for the purpose designed by coining ; and if he does, he has no reason to expect, that the receiver will allow him for it. Some art and labour however is necessary : a plain simple stamp would not well answer the purpose. Care must be taken to make the stamp such, as is not easily counterfeited : because otherwise base metal, or metal under weight, might be made to pass, as if it was pure and of due weight, by the help of such a counterfeit stamp. And care must likewise be taken to stamp or mark it in such a manner, that no part of the metal after it is once stamped, can easily be taken away, without effacing the stamp, either in whole or in part, so as to discover the fraud. So much art and labour as this will be of use to the receivers ; as the money passes from one hand to another : and therefore the coiner may expect to be paid for it. The value of this art and labour is what a piece of metal is worth, when it is coined into money, more than an equal weight of the same metal would be worth in bullion.

As the stamp is designed to ascertain the weight of metal, and as money is designed to be the matter of general exchange ; it is proper, that the business of coining should be in the hands of persons of the most undoubted and of the most extensive credit. The stamp of a person of doubtful character would not in-

duce any one to take money so stamped without weighing it: and the stamp of a person of good credit, if he was not much known, would induce only the few, who did know him, to take it upon his authority. Upon this account money, that is coined by national authority, or by the government of each nation, will best answer the purposes designed by coining.

My subject led me to say something concerning the price of goods and labour, and the grounds of its variation: and as this engaged me to enquire into the use and value of money, the reader will, I hope, excuse me, if this digression has been longer than he expected.

Use of
money
varies the
price of
goods.

XXII. The introduction of money occasions another seeming variation in the price of goods, besides those, which we have taken notice of already. ^k Money, though it is used as the standard of price, by which the different values of goods or of labour are compared with one another, is not wholly invariable in its own price; that is, in respect of goods or labour it has not always the same comparative value. There is not always the same quantity of money amongst all mankind, who have an intercourse of commerce with one another; and much less is there always the same quantity of it current in the same nation, or amongst those, who upon account of their nearness or other connections have the most frequent intercourse of commerce. The scarcity of money raises its price, and the plenty of it sinks its price; in the same manner as the scarcity or plenty of any thing else varies the comparative value of that thing. If when money is scarce, a small quantity of it is equal, upon the comparison, to a certain quantity of any sort of goods or labour; a greater quantity of it, when it is plentiful, will only be equal in value to the same quantity of the same goods or labour.

^k Grot. *ibid.* § XIV.

A quarter of wheat, which at one time is worth no more than two shillings, may at another time, in the same plenty of wheat, be worth forty shillings: not because there is any alteration either in the intrinsic usefulness of wheat, or in the comparative value of it with other goods, such as sheep, cloth, wine, &c; but because the quantity of money is altered, so as to be twenty times more plentiful at one time than at the other; and upon account of this greater plenty twenty times any quantity of it, when compared with the same sort of goods, will be worth no more, or will bring in exchange no more of those goods, than the simple quantity was worth or would have brought in a greater scarcity. In cases of this sort we usually say, that wheat or any other sort of goods is grown dearer: but the fact is, that money is grown cheaper. Only as money is looked upon to be the standard of price, and is therefore considered as invariable in its own price; goods or labour seem dearer or cheaper, in proportion as more or less money must be given for the same quantity of them.

XXIII. ¹ Before we leave this subject of mutual contracts, it may be proper to say something concerning some of the most usual contracts of this sort. Buying and selling is a very common and well-known contract. But the writers upon natural jurisprudence do not seem to have determined some of the questions arising upon it with sufficient exactness. It may be asked at what time the contract of buying and selling is complete? But before we can answer this question, it will be necessary for those, who ask it, to explain what they mean by the bargain, being complete. The bargain may be said to be complete, either when the parties are bound, each to the other, to do what they have agreed upon; or when the property of the goods is actually

Buying
and sel-
ling.

¹ Grot. *ibid.* § XV.

transferred to the buyer, and the property of the money to the seller.

In the first sense the bargain is complete, as soon as the parties have agreed upon the price : the feller has then agreed, that he has parted with such a quantity of goods for so much money ; and the buyer has then agreed, that he will part with so much money for such a quantity of goods. The buyer after this can justly force the feller to deliver up the goods, and the feller can justly force the buyer to take the goods and to pay down the money. But if the matter rests here, it is only a promisory contract ; the bargain is not so far completed, as to have transferred what was the property of either party to the other. They agreed, they they would transfer this or that ; but they have not actually transferred it. The demand therefore is yet only upon the person, to force him to do what he had promised : there is no demand upon the thing, till the property is actually transferred. If then either the buyer or the feller was to die, before they had proceeded any farther, I do not see, that the survivor would have any right over the goods or money agreed for ; nor consequently, that he would have any right to force the heir of the deceased to stand to the bargain.

To complete the bargain so far, as to give each a right, not merely over the person, but in the things of the other ; some acts or words are necessary denoting a mutual consent of each to make an actual transfer of his property to the other. Such a transfer as this is sufficiently expressed by the mutual delivery of the goods and money. Or it may be expressed only by the delivery either of the goods or of the money on one part, and the acceptance of what is so delivered on the other part ; because, as the feller for instance, had agreed, that he would give the buyer property in such or such goods, in consideration of so much money to be paid to

himself; if the buyer pays the money, the feller, by accepting it, must be understood to do what he had before agreed that he would do, upon this consideration. Delivery in part, or giving earnest, has the same effect: it is designed on the buyers part to signify his will to make an actual transfer of his property in the money agreed upon; and the feller by taking earnest, is understood to give his actual consent to what he had before agreed to do, in consideration of receiving property in the purchase-money. In the purchase of immoveable goods, such as houses or lands, the feller, though he cannot deliver the whole thing purchased, may by a negative act signify his consent to make an actual transfer of the property, which he had in such goods. This negative act is his suffering the buyer, without interrupting him, to take possession by settling in the house, or by cultivating the lands, or by letting either of them to some other person, and receiving the rents or profits. The thing purchased may indeed be delivered in part by a positive act; as in the sale of lands by delivering a clod or a turf, as in the sale of houses by delivering the key. The parties may likewise transfer their property each to the other, in moveable or immoveable goods, or in money, by words either spoken or written; if instead of engaging in words of future time, that they will transfer, they expressly declare in words of present time, that they do transfer their property. Where such words of present time are made use of, the bargain does not rest in a promise; it does not merely give each a claim upon the person of the other, but gives actual property in the thing itself.

After the bargain of buying and selling is complete, suppose the thing sold to remain in the sellers possession, and whilst it is so, to perish, or to be any way

lost or damaged ; it is farther enquired, whether the buyer or the seller is to bear the loss ? Here again we are to consider, what is meant by the bargains being complete, that is, we are to consider what sort of a bargain it was, whether it was promissory only, so that in virtue of it the parties had each of them a right merely over the person of the other ; or whether it was such a bargain, as made an actual transfer of property from one to the other.

In the former case, where the bargain rests in a mutual promise ; the goods are still the property of the seller, and the money is still the property of the buyer : the seller therefore must bear the loss or damage ; because naturally all the loss or damage, which a thing sustains, falls upon the owner of it. The buyer agrees, that he will give such a sum of money for a house or for lands ; but before the property is transferred, the house is burnt down, or the sea washes away the lands : the seller can then have no demand upon him for the money : the house and land are still the property of the seller ; and the loss will naturally fall upon him.

If indeed, either by delivery in part, or by the plain words of the contract, the property of the goods was transferred to the buyer, and before he has full possession of them, they perish or are damaged : the loss falls upon him, as being the owner of the goods, and not upon the seller, in whose hands they happen to be.

It is true that if such goods perished or were damaged through the fault of the seller, then the buyer has a demand for an equivalent : but this demand arises from another principle to be explained hereafter, and not from the contract.

These particulars may be otherwise settled between the buyer and the seller by express words. But it would be endless to reckon up all the exceptions, or condi-

tions, which they may add to their bargain : all that we can pretend to do is to shew what rights arise out of the mere contract, where nothing else is agreed upon. Only it is to be observed, that, where any express conditions or exceptions are added by the consent of the parties, each of them is obliged, by his own consent, to comply with such conditions or exceptions.

If I sell the same goods twice, it may be a question, which of the two purchasers has a right to the goods. Here we are to enquire, what sort of a bargain the first of the two was. If it was such an one, as gave the purchaser property in the goods, the second bargain will be void : because, as the goods, at the time of this second bargain, were not mine, I had no right to dispose of them. But if the first bargain was promissory only, so as to give the purchaser a personal demand upon me, but no property in the goods ; then the second bargain, provided it was such an one as gave property, will be so far valid, that the second purchaser will have a right to the goods : this second bargain, though my former promise had made it unlawful, is not void ; since, by the supposition, the goods were still mine, or I had still a right in them. In the mean time there is no reason for saying, that the validity of this second bargain will make void the first : the claim of the first purchaser will still continue what it was, a demand upon my person to the value of the goods, upon his paying me the sum of money, which we had agreed upon.

XXIV. ¹ Letting and renting is subject to nearly the same rules with buying and selling : for these two contracts are in all respects very like one another. The principal difference between them is, that in letting and renting the owner or landlord sells, and the occupier or tenant buys, the use of the thing : whereas in buying

Letting
and rent-
ing.

and felling, the owner fells, and the purchaser buys, the property in it. The consideration, which is paid for the property in one of these contracts, is called the price: the consideration, which is paid for the use in the other contract, is called the rent.

When a man has purchased the property of a thing, if the thing is lost or damaged, he is to bear such loss or damage. Suppose therefore, instead of purchasing the property of the thing, that he had only purchased the use of it; then if the use of the thing is lost or damaged, the loss or damage of the use seems naturally to fall upon him, who is the owner of the use; that is, upon the tenant; and not upon the landlord, who has parted with the use, though he is still owner of the thing.

But this rule wants to be explained, in order to adjust the several claims of the owner and the hirer. The use of a thing may be lessened two ways. It may be lessened, though the thing continues in the same condition, as when it was hired; or it may be lessened by some damage, which makes the thing worse in itself, than it was then.

All losses in the use of the thing, which are of the first sort, or which happen without any damage in the thing itself, naturally fall upon the hirer. These are losses in the use only, which use he has made his own by purchasing it. Suppose I hire a shop, which is well situated for trade, at the time of hiring it, and consequently is worth a large rent: but before the time, for which I hired it, is expired, the course of trade alters; and my custom becomes by that means much worse, than might reasonably have been expected, at the time when I first entered upon the shop. In this case the use of the thing is damaged, without any damage in the thing itself. Since therefore the thing is no worse;

the loss cannot justly fall upon the owner of the thing: it is the use only of the thing, which is lessened, and this must naturally fall upon me, as the owner of the use.

But if the use is lessened by any damage, which the thing itself has sustained; the loss will naturally fall upon the owner of the thing: because as the damage primarily affects the thing itself; there can be no just reason given, why any one else, in particular why the owner of the use, should bear the loss, which happens to the others property. This seems to be clear in those instances, where the damage done to the thing itself is such, as to destroy the very existence of it. I hire a house, and before the time, for which I hired it, is expired, the house is burnt down. No one can imagine, that I am naturally obliged still to pay the rent of it. I hire lands, and before the time, for which I hired them, is expired, the sea washes them away. This event will naturally discharge me from the payment of rent. But suppose that the fire, instead of burning the house down, had made it so ruinous, as to be uninhabitable; or that the sea, instead of washing away the lands, had overflowed them, and remained there, so that it could not be drained off again. There could be no more reason for my payment of rent, upon this supposition, than upon the former. Whatever damage affects the thing itself is naturally the loss of the owner of the thing: but if the hirer was still obliged to pay the same rent, after the thing is perished, or damaged, that he paid before; the owner would suffer no loss at all, the whole of it would fall upon the purchaser of the use. The country, in which a man has hired land, happens to be the seat of war: the enemy seizes upon the land, and keeps possession of it; by which means the hirer of the land is hindered in his use of it. Here the land is lost to the owner; the damage sustained is

properly in the thing itself; and consequently the proprietor can demand no rent of the tenant: because the tenant ought not to bear the loss of another man's property. But suppose the enemy, instead of seizing upon the land, had foraged upon it, and carried away the grass or corn, that was growing there; this loss does not affect the thing itself, but the use of it only; and as it ought therefore to fall upon the tenant, he would still be obliged to pay rent.

There is one exception to the rule, which subjects the owner to the loss, and not the hirer, where the use is made worse, by the thing itself becoming worse. This exception is, when the thing is made worse through the fault of the hirer. It would be unjust to make the proprietor suffer for the neglect or fault of his tenant. If a tenant hires land to sow with corn, and impoverishes that land by his bad management of it; though the use of the land here becomes worse, because the land itself is worse, yet he cannot expect any abatement of rent: because it is not so much the fault of the land, as his own fault, that it is in so bad a condition: it would have been as good as it was, if he had taken such care of it as he ought to have taken.

The contract of letting and hiring, like that of buying and selling, is binding upon the persons of the parties concerned in it, as soon as they have agreed upon the rent. But something farther is requisite to give one of them a right to the money, and the other a right to the use. Delivery of the money in whole or in part gives the owner of the thing to be let a right to the money; and upon his acceptance, as he knows upon what consideration this payment is made, the hirer has a right to the use of the thing. In this manner the owner tacitly makes over the use. But he may likewise do it expressly by words of present time either spoken or written.

The bargain even as to fixing the rent may possibly be tacit on both sides. As if I have hired a house or lands for some years, and after my term, for which I at first hired them, is out, I continue to live in the house, or to occupy the lands; as both parties knew what conditions they had agreed upon before; from this act of mine and from the owners giving me no disturbance, the reasonable and necessary presumption is, that we approve of the former conditions, and are still willing to abide by them.

XXV. In letting and hiring of labour; if we hire the labour of a man in general for a certain time; whatever accident may happen to him, and disable him from labouring, he has a claim to his wages; provided he is willing, under such inability, to do us all the service that he can: because what we purchase was his labour for that time: whether therefore his labour within that time is little or much, it is all that we can claim; and when our claim is satisfied, it will be unjust to diminish his. But if we hire him to do any particular work, and not merely for any certain time; whatever disables him from performing that work releases us from the obligation of paying his wages: because he has no claim to them, unless he performs the work, for which he was hired.

Letting
and hiring
of labour.

^m If I have hired out my labour for a particular purpose, and the same labour may be profitable to more persons, besides the first hirer; nothing hinders me from taking as much of those other persons as my service to them is worth without any abatement in the wages agreed upon between me and the first hirer. Each of them has here the valuable consideration, for which the wages are due; and it is no damage to the first hirer that I can make an advantage of my labour, besides what I am to receive from him. I am hired

^m Grot. *ibid.* § XIX.

to go a journey to do some particular business for the person, who is to pay my wages: I can in the same journey do business for others, without neglecting his, whatever wages I am to receive from him, who first hired me, will be due to me, notwithstanding the gain, which I accidentally make of others, who take this opportunity of employing me: since my labour is not the less valuable to him for being serviceable to them.

Loan of
consumable
goods.

XXVI. ⁿ The loan of goods, which cannot be used without being consumed, such as grain, wine, &c, and more especially money, is a contract of mutual benefit, and plainly belongs to that sort of contracts, in which things are given for things to be given again. The Latin expression for lending things of this sort (*mutuo dare*) imports a mutual giving. In this respect it differs from (*commodatum*) a loan of such goods, as may be used without being consumed: for a loan of this latter sort is a beneficial contract only on one side; the use of the things is given by one party, and nothing is given for it in return by the other party.

It is to be observed farther, that in such things, as cannot be used without being consumed, the use cannot possibly be separated from the property; as it may be in other things. One man may either by free grant, as in a loan, or by purchase, as in letting and renting, have the use of houses, or lands, or cattle, or books, &c, whilst another man has the property in them, or the sole right to dispose of the things themselves. But no use can be made of grain, or wine, or money without disposing of them: the grain must be sold, or must be spent in the family, or must be sown upon the land; the wine must be consumed in some such manner; the money must be laid out in purchasing necessaries, or in some way of commerce. But whoever has a right thus to dispose

of the things themselves must have property in them. There is therefore in things of this sort no right of usufruct separable from property; but when a man lends them, he makes over the property in them to the borrower: since he, who grants the use, must grant the property at the same time, if there is no use separable from property.

This might occasion an enquiry, in what respect a gift differs from a loan, where the things given or lent are such, as will be consumed in using; since he, who lends them, grants the property of them to the borrower; and he, who gives them, seems to grant no more. The difference between them is, that a gift is a grant of property, without any condition of making a return: but a loan is a grant of property under a condition, that, either upon demand, or at a certain time limited, the property in an equivalent shall be returned.

XXVII. ° We may here enquire, whether it is unlawful to take interest, or any valuable consideration, for the loan of such goods as are consumed in their use, more particularly for the loan of money. I would not call the valuable consideration, which is taken for the loan of money, by the name of usury: because this word has by common custom been made to signify such an exorbitant consideration, as is oppressive and unjust. I therefore chuse to call it by the name of interest, which is a word of a milder signification, and has not by custom been made odious.

Interest
for money
upon what
principles
to be de-
fended.

Grotius has mentioned three arguments, which are sometimes used to shew, that interest is unlawful, or that it is contrary to the nature of the contract between the lender and the borrower, for the former to take any consideration upon account of money lent, beyond the payment of the principal money itself. First it is urged, that the nature of a loan, since it is a beneficial

° Grot. *ibid.*

act, will not allow us to take interest or any valuable consideration for what we lend.—We might indeed question here, whether a loan of such goods, as are consumed in their use, is a beneficial contract, or not: but to pass this over, we may observe, that the argument here urged against taking interest for money lent, if it proved any thing at all, would prove too much. The loan of such goods, as may be used without being consumed, is a beneficial act; and if we will conclude from the nature of a loan, that to take any consideration for the use of money is unlawful, we must, for the same reason, conclude it to be unlawful to take any rent for the use of houses or of land. In the mean time however, it must be allowed, that, when we take rent, the contract is changed from one of simple to one of mutual benefit; it is then no longer a loan, it becomes letting and renting. But though it is thus changed from a gratuitous contract to one of mutual benefit; it does not follow, that it is changed likewise from a lawful to an unlawful one: the latter contract, when it is made upon fair and equal terms, is in its own nature as lawful as the former.—It may be urged in support of this argument, that letting and renting, where the owner has made his bargain accordingly, is indeed a lawful contract, and that he, who has made such a bargain, may lawfully require the payment of rent: but that the loan of books or cattle or houses or land is in itself a contract of simple benefit; and that he, who from the first, instead of letting, has lent any goods of this sort, has no just claim to rent, or to any valuable consideration for the use of such goods. He may, if he pleases, lawfully make such a contract at first, as will entitle him to rent: but if he has originally lent his goods, he cannot afterwards lawfully demand any rent; because he cannot make

such a demand consistently with his own agreement. Now this, it may be said, is the case of money; we lend it, whenever we grant the use of it to another: the contract is therefore a loan from the beginning; and consequently we cannot, consistently with the nature of our first bargain, require any interest or valuable consideration afterwards.—But this conclusion has nothing to support it, besides the scantiness of language: whatever our bargain is in thus granting the use of money to another, we always indeed call it lending; because we have no other word to express it by. To make the conclusion a just one, they, who urge the argument, should shew, that in lending money it is unlawful from the beginning to agree with him, to whom we lend it, that he shall give us a valuable consideration for the use of it.

A second argument to prove the unlawfulness of taking any interest or increase for money lent, is; that money is barren in its own nature; that no profit arises from it, without the labour and industry of him, who uses it; and consequently that this profit, being due to the labour, is the property of the borrower, as his labour has produced it; and the lender, who has had no share in the labour, can have no claim upon the profits arising from it.—This argument again would prove too much, if it had any weight at all. Houses or arable land are profitless in themselves: the advantages arising from them are produced by the labour and industry of the occupier. And yet it is not deemed unjust, that the landlord, notwithstanding he bears no part in the labour, should receive rent from the tenant. The fact is, that as in the use of houses or land, so in the use of money, the profit is due partly to the thing, and partly to the labour: because as the thing would have produced no profit without labour;

so there could have been no labour, and therefore no profit of labour, without the thing. The consequence of this is, that the person, who labours, and the proprietor of the thing, have each of them a claim upon the profits, which arise from the use of it.

This answer will open the way to the third argument against taking interest for the use of money, and will shew it in its full strength. I might urge, when you lend me a certain sum of money, that by granting me the use of it you grant me at the same time the property of it; since the use of money and the property of it are inseparable. If therefore you demand any increase, when I pay you the principal; you demand more than is due to you: what I received was the property of such a sum of money; I pay you the same sum of money; and consequently, having paid you as much as I received, I have paid all, that you can fairly demand. You demand something more than the principal, in consideration of the use: but I reply, that the use and property are inseparable: if therefore your property is returned, what right have you to any thing more? especially if you consider, that the profit of it, being partly due to the thing and partly to the labour of the user, must be due wholly to me; since you made me the proprietor by lending me the money, and I was confessedly the user or occupier, —This argument would indeed be unanswerable; if you had not originally bargained for interest or increase: for since by lending me the money all you do is to make over the property of it to me for a certain time, I cannot see, that this act considered by itself can entitle you to any thing more, than your own property again, when that time is expired. Though the property of the money was mine only for a time, yet it was as much mine, during that time, as if it had been

mine for ever. If therefore you would secure your just claim to interest, you must take the matter higher; you must from the beginning make your bargain accordingly, and must shew, that a bargain originally made, to receive more than your principal in payment, is consistent with justice. It will appear that such a bargain would be a just one, provided you can shew, that you parted with any valuable consideration, besides the principal money, in making over the property of it to me for any certain time: and this you may easily shew; because in parting with the principal money you parted with all the gain, which you might have made of it, during the time of its being in my hands, if, instead of lending it to me, you had employed it yourself in trade or in husbandry.

This then is the foundation of our claim upon me to receive interest for the money lent me; or rather the foundation, upon which you are to justify making a bargain from the beginning to receive it. You claim such interest in consideration of the gain, which you might have made by using the money yourself. Indeed your interest cannot fairly be equal to the highest gain, which you could have made: you must allow something for the uncertainty of this gain; it might by accident have been less than you hoped for: and you must allow something for the trouble, which you must have been at in making such advantage. When from the usual gain, which is to be made of such a sum of money, in trade or in husbandry, you have deducted a fair allowance for the uncertainty of your expectations, and a fair allowance likewise for the price of your labour; the remainder of the clear profits arising from the use of your money may be considered as due to you beyond your principal.

Something more than this may indeed be fairly claimed, where you run any hazard of losing your principal by my becoming unable to repay it : you may in these circumstances justly expect to be paid for such hazard. And upon this account it is, that you may fairly expect higher interest, where your security is bad, than where it is good.

There is indeed one case, in which interest may be demanded for money lent though it was no condition of the original loan ; and that is, when the money is not repayed at the time fixed for payment. At that time the borrowers property in the money ceases, and the lender may demand to be satisfied for whatever damage, he sustains by not having his property restored to his possession at the time that it ought to be.

Usury
why for-
bidden by
the Mo-
saic law.

XXVIII. The authority of the law of Moses seems to weigh the most of any thing with those, who maintain that interest is unlawful. Grotius urges upon this head, that the matter of the law, which forbids usury, though it may not be necessary, is certainly commendable ; and that, in this view, the law is binding upon christians, who are obliged by the gospel, not only to observe the rules of strict justice, but to comply likewise with all the most perfect and exalted rules of moral duty. An Israelite, says he, was allowed indeed to take encrease of a stranger, but was forbidden to take it of his neighbours or brethren. Now the gospel, as he goes on, has taught us to look upon all mankind as our neighbours or brethren. From whence he concludes, that whatever moral duty one Israelite owed to another ; the same duty is owing from a christian to all mankind : so that no christian, consistently with his religion, can take interest or encrease of any man for money lent.

Before I examine this argument ; it may not be amiss to inform the English reader, that a passage in

the book of Leviticus relating to usury is wrongly translated in our Bibles. • The passage is this — And if thy brother be waxed poor, and fallen in decay with thee; then thou shalt relieve him, *yea though he be* a stranger or a sojourner, that he may live with thee: take thou no usury of him or encrease; but fear thy God, that thy brother may live with thee: thou shalt not give him thy money upon usury, nor lend him thy victuals for encrease. — This passage at first sight implies, that the Israelites might not take encrease of a stranger or sojourner; if he was grown poor or fallen to decay amongst them: they are commanded to relieve their brother, who was in such distress; not only if he was an Israelite; but though he was a stranger or a sojourner, they were to take no usury or encrease of him. But it is to be observed, that the words, *yea though he be*, are not in the original: and if we render the original literally it will be — Thou shalt relieve him, a stranger or a sojourner, that he may live with thee. — There is something wanting to make the sense full; and instead of supplying it with the words *yea though he be*, it should have been thus supplied — If thy brother is waxen poor; and fallen to decay with thee, then thou shalt help him, a stranger and a sojourner *shall help him*, that he may live with thee. — In the common translation it is plain, that a stranger or a sojourner must be called the brother of an Israelite; which is so unusual in the other parts of the law of Moses, that this alone would be a sufficient reason for concluding, that our translators have missed the sense of this passage. The intent of the law in this place seems to be, that all persons, who lived under its jurisdiction, whether they were Israelites or sojourners, should help a poor Israelite. This precept is, in this respect, like the fourth precept of the decalogue; it

° Levit. XXV. 35. &c.

extends to all, who dwelled in the land. And we may find a farther reason for preferring this sense to the sense, which is expressed in our translation, if we compare this passage with another, that we meet with in the book of Deuteronomy. * The law says there, — Thou shalt not lend upon usury to thy brother, usury of money, usury of victuals, usury of any thing, that is lent upon usury: unto a stranger thou mayest lend upon usury, but unto thy brother thou shalt not lend upon usury. — Here is a plain difference made between those, who are called brethren, and those, who are called strangers. Nay we find, that the Israelites were allowed to lend upon usury to strangers, though they were forbidden to lend upon usury to one another. And since, according to the common translation of the passage cited from Leviticus, they were alike forbidden to lend upon usury either to their brethren or to strangers, it is evident that our translators must have mistaken the sense of that passage; because the same law cannot expressly allow in one place what it expressly forbids in another.

If then it appears, that the Israelites were forbidden to lend upon usury to one another only, and were, without exception allowed to take usury of strangers; the consequence will be, that there can be nothing morally wrong in the practice itself: if there had, they would have been forbidden it in respect of foreigners, as well as in respect of one another: since what is wrong in itself, is as much so, when practised towards one set of men, as when practised towards another set. But if this practice was not forbidden to the Israelites upon account of any viciousness in it, then, notwithstanding the perfect morality, which christians are obliged to, we cannot conclude from this precept in the Mosaic law, that it is unlawful for christians to take interest for money lent.

In fact this precept seems, from the distinction made between Israelites and strangers, to be of a political rather than of a moral nature : and no part of the merely political law of Moses is binding upon christians. The circumstances of the Hebrew nation, and the Mosaic constitution of government will shew us upon what policy this law was founded. They were not originally a trading nation, and consequently could make but little advantage by the use of money. And besides, by the Mosaic constitution the land was equally divided between the several members of the community ; and lest this equality should in process of time be broken in upon, no person was allowed to purchase land in perpetuity : whatever was bought, was to return again at the year of jubilee to the former owners. With the same view likewise, that the inheritance of one family or tribe might not pass into another, and the original equality of land be destroyed by accumulation, heiresses were commanded to marry within their own family or tribe. Since then we may collect from these institutions, that the legislator intended to preserve an equality, and to prevent any one person or family from growing too rich ; a plain reason appears, why usury, especially in a nation without trade, should be prohibited. If it had been allowed of, those, who paid it, must have been impoverished ; and those, who received it, though they were in some measure prevented from realizing their fortunes by purchases of lands in perpetuity, would yet have grown more rich in proportion to their neighbours, than the law designed they should be.

XXIX. There is another question, which may arise concerning a loan. If the value of money should alter between the time of borrowing and the time of paying, it may be asked, whether the payment is to be made according to the value of the money at the time

Question
relating to
a loan.

of borrowing, or according to its value at the time of paying.

Before we can answer this question it must be made a little more determinate, than it is in this manner of stating it. Let us state the question thus.—Suppose I have lent a certain number of pieces of any particular denomination, and before the time of payment, those pieces change in their price, or in their relative value, when compared with pieces of some other denomination; as suppose, for instance that I lend a hundred guineas, which at the time of lending them are each of them worth twenty two shillings; but that, before the time of payment, guineas are each of them worth no more than twenty one shillings; would it be a sufficient payment, if the borrower was to return, the same number of pieces of the same denomination, that is, to return me a hundred guineas again.

Here it would be necessary to know, whether the intrinsic or the extrinsic value of the pieces in question had been changed, so as to make this alteration in the price of them. Certainly if their price had been altered by a change in their intrinsic value, there would be no reason to think it a sufficient payment.

The intrinsic value of guineas, or of any other pieces of money, can be made less only by making them of baser metal, or by putting a less quantity of pure metal into them. Suppose then, that I lend a man a hundred guineas of a pure sort of metal; it seems to be self-evident that, if before the time of payment the guineas have been lowered in their intrinsic value, by making them of baser metal, he does not pay me what he borrowed by returning a hundred guineas made of this baser metal. I lend a man a hundred pieces of gold, which are called guineas: no one could think, that he would make a full payment by return-

ing an equal number of pieces of brass of the same shape and stamp. And it would be as plainly no full payment, if the pieces returned were a mixed metal of half gold and half brass: for what I lent was all gold, and what I receive is but half gold. You might say indeed that these are counters and not guineas. But this is not the true reason, why I am not fully paid. It is not the denomination, which gives the value to money, but its weight and fineness. The payment is short, not because what I lent were called guineas, and what I receive are called counters; but because the weight and fineness of what I receive is not the same with the weight and fineness of what I lent.

The second way of debasing the coin is by making a greater number of pieces of the same denomination out of the same weight of pure metal. Thus if a pound of gold makes forty guineas, and I lend forty such guineas; it would be a short payment, if I was to receive only forty guineas of such a size, that three-score of them would weigh no more than a pound. In this rate of payment, the number, and the denomination, and the fineness both of the pieces that I lend, and of the pieces that I receive, would be the same; and yet I should receive but two thirds of my debt: because the weight of these forty guineas is only two thirds of the weight of what I lent.

In reckoning money we are apt, where the denomination and number is the same, to consider the value as the same too; without considering that the way of estimating the quantity of money by the number of pieces is quite accidental. This way of reckoning proceeds upon a supposition, that all pieces of a certain denomination with such a certain stamp upon them, have a certain degree of fineness and a certain weight. Upon this supposition, counting the number of pieces,

comes to the same in the end as weighing them. But whenever this supposition has been taken away by keeping the denomination or stamp and changing the fineness or the weight of the pieces; those, who are not forced to do otherwise by positive laws will take the money by tale no longer; but it will adjust its fineness and estimate its weight, in order to determine the quantity of pure metal that they receive.

Where the intrinsic value of the pieces is the same, their extrinsic value in comparison of any other pieces, as of shillings for instance, may be altered, either first by debasing the metal, out of which those shillings are made; or secondly, by lessening their weight without debasing the metal; or thirdly, by the accidental variations in the quantity of silver and gold, that are current. But naturally these alterations in the extrinsic value of gold, or of guineas made of gold, are of no account: because naturally gold is lent as gold, without any reference to silver. It is only civil institution, which has given it this reference, by considering all the current coin of a nation, as if it was of the same species; by considering for instance shillings as parts of a guinea, and halfpence as parts of a shilling, without regarding the difference of the metal, that these several coins are made of. But naturally, if I lend a hundred guineas, each of which, in reference to silver, is then worth twenty two shillings, and am to be paid again, when, in the same reference, each is worth no more than twenty one shillings; I shall be fully paid, if a hundred guineas are returned me. The gold that passes between me and the borrower is to be estimated only by its weight and fineness; and not by its value in comparison with silver, any more than by its value in comparison with any thing else. It would be readily seen to be a very strange question, supposing I was to lend a

guinea, when it would buy five bushels of wheat, and was to be paid again, when it would only buy four, whether a guinea would be full payment? And it is in the nature of the thing as strange a question, supposing I lend a guinea, when it would buy me twenty two pieces of silver, and am to be paid again, when it would only buy twenty one such pieces, whether this is full payment? What has made us see the strangeness of the former question more readily than of the latter is, that guineas and wheat are considered by us as different species of things; so that in estimating the value of the one we do it without any necessary or customary reference to the other. But guineas and shillings in a nation, where both of them are current coin, are looked upon as things of the same species, and as differing only as a part differs from the whole: by which means we are led to estimate the value of the one by the proportion, which it bears to the value of the other. Suppose I lend two pounds and a half of gold in bullion, which compared with silver is at that time worth two thousand two hundred shillings: it would I imagine be thought full payment, if I received two pounds and a half of bullion again; though perhaps at the time of payment it might be worth no more in silver than two thousand one hundred shillings. For the natural rule is, that in such things as are estimated by number, weight, or measure, it is a full payment, if we return the same species in equal number, weight, or measure. The coining these two pounds and a half of bullion into a hundred guineas, before I lend it, would make no real difference in the two cases: for all that is done by coining is to denote by a certain stamp upon each piece, into which the bullion is divided, what is the weight of that piece. Coining the bullion might indeed make such an imaginary difference, as has occasioned all the difficulty in this question: the bullion being then changed

into gold-coin, we might by that means be led to consider it as of the same species with silver coin, and to judge of its value, not by its weight, but by its relative value in comparison with silver-coin.

This reference of gold coin to silver-coin in determining its value, as if they were of the same species, and differed from one another only as greater and less, is kept up in civil reckonings by referring both of them alike to some common and settled denominations: which denomination is so far imaginary, that it is quite accidental, whether there are any pieces coined, which answer to the several terms of such denomination, or not. Thus in England our civil way of numeration is by pounds, shillings, and pence. All our coin in reckoning money whether it is gold or silver or copper, is referred to this standing denomination; which is in itself only an imaginary one. There are indeed such pieces as shillings, which answer to one term in this common denomination: but it is quite accidental, that there are such pieces: this term in the denomination was not taken from the coin, which is called a shilling, but was itself the occasion that such pieces should be coined. And it is plain, that this term might, in reckoning money, be as readily made use of, as it is now, though there was no such coin as a shilling; since another term in the same denomination, the term of pounds, is well understood, and easily applied; though there is in fact no such coin as a pound.

As far as the civil law, for the sake of making all the coin, that is in a nation, circulate alike, requires it in all loans and all payments to be reduced to such a common standing denomination, the state of the question now before us would be changed, and the determination upon it must be changed accordingly. If I lend a man a hundred guineas, when the value of each

guinea is one pound two shillings; the sum, that I lend, is not to be called a hundred guineas, for guinea is no term in the national way of reckoning; it must be called one hundred and ten pounds. Here if it be asked, whether a hundred guineas, when each is reduced to the value of one pound one shilling would pay me, the answer will be clear; if we consider what sum according to the national way of reckoning money a hundred such guineas would make. They would make no more than one hundred and five pounds. And we cannot well imagine, that one hundred and five pounds paid will be a full payment for one hundred and ten pounds lent.

We may put this question in another instance, where perhaps the matter will appear clearer. I lend a hundred crowns; and each crown, at the time of lending them, is valued by the law at five shillings; by which I do not mean that it is worth five such pieces as we call shillings, but that it is considered, in reckoning money, as the fourth part of a pound on one hand, or as equal to sixty pence on the other hand. Before the time of payment, the law reduces these pieces in their value, and reckons each to be worth no more than four shillings, that is, that to be the fifth part of a pound or equal to forty eight pence. Would it be a full payment if the borrower was to return me no more than a hundred such pieces? If there is any doubt about the true answer to this question, instead of calling them crowns, call them five shilling pieces, when they are lent, and four shilling pieces, when they are paid: and then, I suppose, it will be plain, that four hundred shillings paid is not an equivalent for five hundred shillings lent.

Now if this be the case, when the pieces are called by such names, as express their value in the national way of reckoning; it must be the same, when we are to count our money in that way, though the same pieces should have some other technical name. Thus if,

in like manner, instead of calling the pieces guineas, we call them one-pound-two-shillings pieces, when they are lent, and one-pound-one-shilling pieces, when they are paid; it is evident, that a hundred of the latter is not a full payment for a hundred of the former.

Upon the whole, where a gold-coin is estimated by its intrinsic value; no change is made in the value of it, but by a change in its weight and fineness: and consequently, whatever quantity we borrow, a full payment is made, where the same quantity in weight and fineness is returned. But where in estimating it, we refer it to any extrinsic standard, the value of it is changed, by a change in comparison with this standard, though its weight and fineness should continue the same: and consequently, when we borrow any sum of it computed by this standard, the payment will not be a full one, unless the sum returned, when computed by the same standard, is equal to the sum borrowed.

Nature of
insurance.

XXX. ^P A contract of insurance is void; if it is made, either when the goods insured are perished, and the owner knows it; or when they are out of all danger or hazard, and the insurer knows it. There can be no contract of any particular sort, where there is no matter of such contract: and the matter of insurance is a possible but uncertain loss, against which the insurer undertakes to indemnify the owner: he engages therefore for nothing, unless there may be a loss, and unless that loss is uncertain. But if the ship for instance, which the owner insures, is lost at the time of insurance, and he knows it; there is no uncertainty in the loss, because it has been suffered already: or if the ship is safely arrived in port, and the insurer knows it, there is no loss possible. Indeed such a contract would be void upon account of the inequality of it. The insurer engages his work, in consideration of such a price as his labour would be worth, if he could pre-

serve the goods in the hazard, which they run: but if the goods are actually perished already, he engages for a less consideration than his labour would be worth; because in these circumstances his labour would be worth the whole of these goods: if therefore he ensures for less than the whole value of the goods, he has not his equivalent. On the other hand; if the goods are safely arrived in port, and the insurer knows this, but the owner does not know it; the owner, if he promises any thing at all, promises more than the insurer's labour would be worth to preserve his goods, in such circumstances: and consequently the owner does not receive an equivalent for the price, that he gives.

The work or labour of the insurer, which I have been speaking of, is only a supposed work or labour: for in most contracts of insurance, he does not labour, nor ever intends it. But the form of the contract seems to suppose that he does.—What will you give me to ensure your house from fire? that is, what will you give me to make you sure, that your house shall not be burnt? The making you sure, that such an accident shall not happen, implies, that I will take care to prevent it, and that, if it is not prevented, you shall look upon the loss as owing to my neglect, and upon that account shall require me to make it good.

The necessary equality is preserved in this contract, if the owners gives no more, and no less, than the insurer's labour, considering the hazards, which the goods run, would be worth, supposing him able to preserve those goods from damage.

XXXI. ^a In many instances we find two or more of these simple contracts, which have been already described, united into one act. Thus if I knowingly and

Mixed
contracts.

^a Grotius *ibid.* § V.

designedly give a man more for his goods than they are worth; this is partly a gift, and partly buying and selling. This is one of the instances made use of by Grotius for explaining mixed acts: and perhaps it is more properly called a mixed act than a mixed contract; because that part of it, which is a gift, is no contract. If I bargain with a workman to make rings or vessels for me out of his own metal: this is partly buying his goods, and partly hiring his labour. Some writers indeed consider this as merely buying and selling; because if I had bought the rings or vessels ready made, I must have paid in the purchase both for the materials and for the workmanship. And certainly the only difference as, that in this contract the labour is valued particularly, and is considered separately from the materials; whereas in buying such rings or vessels ready made, we usually purchase the thing in its present state, without making a separate estimation of the materials and workmanship. The contract of ensurance is sometimes mixed with a loan: as when a person lends a sum of money to a merchant for a certain premium, upon condition, that, if such merchants ship returns safe, he shall receive his principal again, but shall lose his principal if the ship is lost. This is called bottomry. As he lends the principal money for a premium it is a loan with interest; and as his receiving such principal again depends upon what may happen to the ship, it is ensurance.

Gain and
loss how
adjusted
in partner-
ship.

XXXII. ^r In partnerships of trade; goods, or money, or labour under which I include skill or management, are by the consent of their respective owners united into one common stock. Each partner has in view a benefit to be received, for a benefit which he gives. The separate stock of any of the partners alone might be too small to trade with in the manner proposed; or

Grotius *ibid.* § XXIV.

the nature of the undertaking may require not only more goods or more money, than any one of them could supply, but more labour or more skill, than any one of them is equal to. The gain arising from the common stock of goods or money is the price obtained for the use of those goods or money ; and the gain arising from their joint labour is the wages obtained for such labour.

If we consider the gain in this view, it is easy to determine what proportion of it each partner ought to receive. In whatever proportion the use of one partners goods is more valuable than the use of the other partners goods, so much more of the gain belongs to the former, than to the latter. I do not mean, that in dividing the gain any regard is to be had to the particular share of it, which arose accidentally from the goods contributed by this or that partner ; but that after the goods are united in a joint stock by agreement, each partner has a claim to the gain arising from it, in proportion to what was the probable value of the use of his goods, if he had traded with them separately. And as the probable value of the use is in proportion to the value of the goods themselves ; each partners claim upon the gain will be in the same proportion. In like manner, where there is a joint labour, since the profits arising from it are the wages of that joint labour, each partner has a claim, not to that particular part of the gain, which his labour earned, for then it would be no partnership, but to such a comparative share out of the common wages or gain, as is proportional to the value of his labour, when compared with the labour of the other.

As the gain of each partner, so likewise the loss of each, ought to be proportionable to the value of what he contributes. As much as the goods, which one partner contributes, exceed in their value the goods, which

the other contributes ; so much the greater is the claim of the former upon the joint stock, than the claim of the latter. Since therefore their respective claims, upon the whole stock, are in proportion to the share of that stock, which came originally from each of them ; their claim upon each part of the whole must be in the same proportion. And consequently if any part of the stock is lost, each partner, having a claim upon such part lost in proportion to his original share, loses a claim in the same proportion, that is, the loss of each is in proportion to the original share, which he contributed towards the common stock.

This then is the rule for adjusting the gain and loss in partnerships, where no express agreement has been made to the contrary. Each partner is to receive such a share of the gain, or to bear such a share of the loss, as has the same proportion to what any other of the partners receives or bears, that the share contributed by the former has to the share contributed by the latter. The interest or claim of each upon the whole stock is in this proportion : and consequently the interest or claim of each in the encrease or decrease of it, in any part added to it, by way of gain, or in any part taken from it, by way of loss, ought to be in the same proportion.

Partner-
ship mixed
with en-
surance.

XXXIII. If the parties agree, that one of them shall have a share in the gain, but shall bear no share in the loss ; the contract is a mixed one : it is partly partnership, and partly ensurance. As they are all of them to have a share in the gain, it is partnership : but he or they, who are to bear all the loss, ensure the principal stock of him, who is to bear none of it.

To adjust the shares, which each party in such a mixed contract is to receive in the gain, we are to consider what it is worth to ensure his principal, who is not

subject to any loss. And when the value of such insurance is deducted from the whole gain, and assigned to those, who were to have borne all the loss, if there had been any ; the remaining gain is to be divided in proportion to each party's share in the capital stock.

XXXIV. It is generally maintained to be contrary to the nature of partnerships, that, where a capital stock is made by mutual consent, the parties so forming a capital stock should agree, that one of them should have all the gain, and the other bear all the loss. And certainly such an agreement is contrary to the nature of partnership ; if we define partnership to be a contract, which gives the parties a common claim to the joint stock : because where they have a common claim to the stock, they must in consequence have a common claim to the gain arising from it ; and to the losses sustained in it.

Contract
of one
party's
bearing
the whole
loss with-
out any
share in
the gain.

But such an agreement, though it may be inconsistent with the nature of partnership, is not inconsistent with the law of common justice. A man wants five hundred pounds capital stock to enter upon a certain branch of trade ; he has only three hundred pounds of his own. I agree to let him have two hundred pounds to make up his capital ; upon condition, that he shall have all the advantage arising from the whole, that, if he saves the whole capital, my money shall be returned, but that if any part of it is lost, I will bear the loss, as far as the two hundred pounds which I have advanced. There can, I think, be no question, whether the law of nature would allow of such an act of humanity as this. You may say, that such an agreement is contrary to the law of partnership. I grant it is, and therefore am satisfied, that it should not be called a partnership. I only insist, that the agreement is not contrary to the law of nature, and leave it to you to call it by

what name you please. Perhaps you may have no name for it ; but a contract is not the more unlawful for wanting a name.

Work and
money
how com-
pared in
partner-
ship.

XXXV. ^s In partnership, where work is contributed on one side, and money on the other ; the partner, from whom the money comes, may contribute either the use only of the money, or the property of it.

If he contributes only the use of it, and still keeps his property in the principal, so that the joint stock is to be considered as made up of the labour of one partner and of the use of the others money ; it is plain, that, supposing the principal to be safe, it belongs to him, and that, supposing it to be lost, he alone is to bear such loss. The other partner, who contributes work, since, as the case is put, he had no claim to the principal money, or to any part of it, cannot be obliged to make good any part of that loss, or to bear any share in it.

But if he contributes the property of his money, so that the joint stock upon which each of them has a common claim, is made up of his principal money and of the others labour ; then the partner who labours, has a claim upon the principal money itself : and consequently, whenever the partnership is dissolved, if the principal money or any part of it is safe, he ought to have a share in it ; and if the principal is lost, he is a sufferer by losing such share.

In the former case, where he, from whom the money comes, still keeps his property in it, and has a right to the whole principal, you may ask what it is, which he contributes ? But the answer is obvious. He contributes the use of his money, that is, he contributes the clear gain, which he might probably have made of it himself. This however is not all. He contributes besides this the hazard of his principal ; because if the

^s Grot. *ibid.*

whole, or any part of it should be lost, the loss is his. In order therefore to adjust the share, which each partner ought to have in the gain, if there is any ; you are to value the work of one, and use the hazard of the others money : and in proportion to the value contributed by each of them, upon such an estimate, their respective gains are to be settled.

In the other case, where he, from whom the money comes, contributes the property of it, and the other contributes his labour ; in adjusting their respective shares of the gain, you are to value the money of one and the labour of the other. And when the comparative values of what each has contributed are thus settled ; their respective shares in the gain are to be in the same proportion.

XXXVI. It is plain from what has been said of contracts, that the obligation arising from them may be dissolved by the consent of the parties concerned in them. The same mutual consent, by which the obligation was originally produced, can destroy it again, without any injustice to either party : since, whatever claim the contract gave them, each of them agrees to give up that claim ; whenever by such mutual consent they dissolve that contract.

Contracts
how dis-
solved.

The obligation however does not cease by any declaration of one of the parties alone, that he will not stand to his bargain ; unless the other agrees to release him : an obligation, which was produced by the concurrence of both their wills, cannot be destroyed again by the will of only one of them : he who declares, that he will not stand by his bargain, cannot by so doing justly take away the right, which the other had acquired by the contract ; unless the other consents to part with that right.

Another way, in which the obligation of a contract ceases in respect of one of the parties, is by the non-performance of the other. In all contracts of mutual benefit, whatever obligation one party is under to give or to do it, is undertaken upon condition of his receiving the equivalent agreed upon. If therefore he fails of receiving such equivalent by the others non-performance; the condition fails, upon which he consented to be obliged; and consequently he ceases to be under any obligation.

But it may perhaps be worth our while to be a little more particular in considering the several ways in which partnerships are dissolved.

First, partnerships are dissolved by the mutual consent of the parties concerned in them: for as in all other contracts, so in these, an obligation arising from their mutual consent may be destroyed by the same cause, that produced it.

Secondly, they are dissolved by the accomplishment of the business, for which they were formed. If the partners consented to form a joint stock, and to give each other, by mutual consent, a common claim upon it, only for a certain purpose; this purpose limits their consent; and in consequence it limits the obligation arising from that consent. Whenever therefore the purposes are brought about, which led them thus to join together, the obligation of continuing so connected is at an end.

Thirdly, partnerships, if they were formed only for a certain time, cease at the expiration of that time. The partners, in their original agreement, limited their obligation to one another, and the mutual claims, which each has upon the things of the other; and by so doing, by consenting to stand thus obliged for a certain time, they plainly shewed, that it was not their design, or that they did not consent to be obliged any longer.

The renunciation of one partner, without the consent of the other, when the purpose of the partnership is not accomplished, or when there either was no time limited, or that time is not expired, is not sufficient to dissolve the partnership. No obligation can in its own nature be destroyed, but by the same cause, that produced it: an obligation arising from the concurrence of the wills of two or more persons cannot be set aside by the single will of one of them. Indeed the partner, who renounces, has it in his power to make it impossible by his perverseness for the partnership to go on: but still, though he has a natural power to do this, he has no right to do it; the obligation of the partnership is in force and will obtain its effect. The only way in which it can obtain its effect, in these circumstances, is by giving the other partner a right to satisfaction for any damage, which may follow from such a breach of contract.

Neither does the death of one of the partners naturally dissolve the partnership, as far as goods or money are concerned. The goods or money of the deceased, which were part of the common stock, were subject to the claim of the survivor: and the heir can receive them in no other condition, than what his ancestor left them in: he can receive them only as part of such common stock, subject to such claim. In respect of labour indeed the case would be otherwise. Labour is a personal act, and consequently the obligation to perform it, being merely personal, cannot descend to the heir. Upon this account, as most contracts of partnership are so mixed, that labour, or some personal act of industry, knowledge, or fidelity have a share in them, it is most usual for partnerships to cease upon the death of one of the partners.

Contracts
of chance,
their na-
ture and
obliga-
tions.

XXXVII. I have already spoken of all contracts of chance, such as wagers or gaming of any sort, as partnerships; and such they undoubtedly are, though not partnerships for trade.

To preserve an equality in wagers, if the stakes are equal on each side, the knowledge, which each party has of the uncertain event, that the wager is laid upon, ought to be equal. Each, by what he stakes, purchases an equal interest in right to the common stock, which consists of their joint stakes. The chance, which each of them has of winning that whole stock, is their respective interests in fact. But if their interests in right are equal; as they are, where they stake equal sums; it is unjust, that their interests in fact should be unequal. And their claims in fact will be unequal, if one of them knows, which way the event had fallen out, where they lay upon a past event, or which way it will fall out, where they lay upon a future one; whilst the other in the mean time is ignorant of the matter, and looks upon the event as uncertain.

In games, that depend upon skill or upon strength, whatever advantage one of the parties has in point of skill or strength above the other, so much he ought to stake more in proportion than the other stakes. The interest, which he has in fact in the common stock made up of both their stakes, exceeds the others interest in it, in the same proportion, that his skill or strength exceeds the skill or strength of his antagonist. And the interest, which in right he has in the same stock, is in like manner proportionable to his stake, when compared with the others stake. If therefore his stake exceeds the stake of his antagonist, just as much as his skill or strength exceeds the skill or strength of his antagonist, their interest in fact will be respectively as their interests in right.

In general, in all such contracts, as depend upon chance, where the stakes are a common stock and the chance is to adjudge that stock to one of the parties; each party ought to deposit as much, that is to pay as much for his chance, as that chance is worth: and since the value of each persons chance, when compared with the others, rises in proportion to his knowledge, skill, or strength; it follows, that each parties stake, which is the purchase of his chance, ought, when compared with the stake of the other, to rise in the same proportion.

XXXVIII. Those contracts are void, by which we engage to give money, or some other thing of value, or to do some beneficial act, in consideration, that he to whom we so engage, shall give us, or shall do for us, what we might have claimed without any such contract.

Contracts with a man to do or give what we might claim are void.

Grotius considers this question under the head of promises, and determines such promises to be binding: because, says he, a promise is binding, though we make it of our own mere motion without any valuable consideration: and for this reason, though the promiser does not, properly speaking, receive any thing, in return, for what he is to give, or to do, yet he is obliged to make good his engagement. He does not properly speaking, receive any thing in return for what he is to give or to do; because what he receives was due to him, or was his own, without purchasing it, and cannot therefore be looked upon as a return for what he promises.

However we should rather consider this as a contract, than as a promise.—If you will let me have my goods, which you detain from me unjustly, or if you, being set as a judge in my cause, will give a sentence in my favour, where the right is clearly on my side; I will give you such a reward.—Here is money to be given, in one case for goods, and in the

other case for work. And such contract are void, if each party does not receive his equivalent. But how have I received an equivalent, if all, that I receive, was my own before ? There must in fact be some force or some fraud in the person, with whom I have to do ; since no man, who designed honestly, would be concerned in selling me what without paying for it I had a right to.

Contracts
void
where the
matter is
unlawful.

XXXIX. " If money, or any other valuable consideration, is promised, in order to hire a man to do an act of injustice, such promise is void.

Grotius determines very singularly upon this point. If says he, I promise any thing, in order to obtain the doing a criminal act, as suppose I promise money to hire a man to commit murder ; such a promise is vicious ; because it is an enticement to the assassin to commit the crime. And since this viciousness continues, till the crime is over ; and since all acts, which have a continued viciousness inherent in them, or connected with them, are void ; it follows, that, till the crime is committed, this promise cannot be binding. But as soon as the crime is over, this viciousness ceases : because the promise can be no longer considered as an enticement to the commission of the crime. The obligation therefore of this promise, till the crime was committed, was in suspense : but as soon as the crime is over, the obligation exerts itself : for the promise was in reality obligatory from the beginning, but its obligation was prevented from taking effect, by a viciousness, which accidentally adhered to it : consequently as soon as this viciousness is removed, by the commission of the crime, the promiser is bound to make good what he engaged for.

Now this whole matter may well be set in a different light. The act of engaging to give wages for the doing a crime is plainly a contract : something is to be given for something to be done : and such contract

is void on both sides from the beginning. A contract which is void on one part cannot be binding on the other part: because if one party is released from his obligation, the other must be released of course, as having no equivalent for what he is to give, or to do, but merely at the pleasure or bounty of the former. But on the part of the assassin, that we may use the same instance with Grotius, the contract is void from the beginning; because he has engaged for such an act, as he has no moral power of performing. If there is any doubt of this; let us suppose, that the assassin had promised to commit the crime without any promise, on the other part, of wages to be given for committing it. His promise would, I think, be clearly void; and whatever reason would make such a promise void, if it had been a gratuitous one, affects it equally, when it is made for a valuable consideration. But if the promise, on the part of the criminal, is void from the beginning; the promise of him, who hires such criminal to do the fact, is void too. As the promises in this case are mutual; the assassin has a claim to his wages only in consideration and upon condition of the other party's having a claim upon him to do the work: but the other party has no claim upon him to do the work: he therefore has no claim to his wages. The commission of the crime, in this view of the case, can give him no claim: for if the contract was void from the beginning, and no other act passes in the mean time between him and his principal, who hires him to do the work; his right to his wages will stand just where the contract left it; that is, it will be no right at all.

We may go one step farther. A promise of wages to do what is unlawful, though it is not an act of injustice, but only an act simply wrong, is a void promise. Here again the principal, who engages to give the wages, contracts with the accomplice to give them in consideration and upon condition, that he, the ac-

complice, shall be bound to do what is not agreeable to the law. Now the accomplice cannot bind himself to this: not indeed because he has no moral power of doing what is simply wrong; since in cases of this sort the law does not take away the power of acting, but only directs the use of it: but he is however incapable or has no moral power of binding himself to such an act, because such obligation, if it was possible, would supersede the obligation of the law. If then the accomplice is not bound by his promise, neither is the principal bound by his. The accomplice therefore cannot pretend to have any claim grounded upon the promise of the principal: because this promise was void from the beginning.

Obliga-
tion how
restored to
void con-
tracts.

XL. We have seen in what instances extorted or erroneous promises, contracts for want of equality, and either promises or contracts made by persons under age or out of their senses are void. But when the fear is removed, by means of which a promise was extorted, or when the mistake, which occasioned a promise, is set right; when the minor comes to years of discretion, or the lunatic recovers his senses; or lastly when the inequality in a contract is discovered; suppose the party, whose obligation is void in any of these instances, is willing to abide by the obligation; what is required in order to bind him? Certainly his mere intention of binding himself is not sufficient; for a mere intention does not bind in any case: and from what has been proved already his former act did not bind him. Some new declaration therefore, or at least some outward, though tacit, mark of this intention, is necessary. It does not indeed seem necessary, that he should go over the whole form of promising or contracting again. One would think, that he sufficiently shews his design, either by acting in any instance, as if he looked upon himself to be still obliged, or even by neglecting, when any fair occasion offers itself, to declare, that he does not acquiesce in the obligation.

C H A P. X I V.

Of Oaths.

- I. *An oath what.* II. *Obligation to fidelity.* III. *Obligation to veracity.* IV. *What concealments consistent with this obligation.* V. *Affertory oaths confirm an implied promise.* VI. *The nature of an oath.* VII. *Oath where God is not mentioned how to be understood.* VIII. *What security an oath gives to the truth of what is sworn to.* IX. *Credit due to an idolaters oath.* X. *Oaths may be taken by proxy.* XI. *Oaths and vows how distinguished.* XII. *No effect of an oath, unless there are outward marks of an intention to swear.* XIII. *Want of inward intention, where there is the outward mark of it, does not prevent the effect of an oath.* XIV. *Oath is void, when the pact is so, with which it is joined.* XV. *Oath to a robber binding.* XVI. *Effect of an oath does not extend to the jurors heirs.* XVII. *Oaths to do harm not binding as vows.*

I. ^w **A**N oath is a solemn act, by which we renounce ^{An oath what.} our hope of God's mercy, or devote ourselves to his displeasure, if we are guilty of falsehood. It is sometimes defined to be a religious act, by which God is called upon, as a witness, to confirm what might otherwise be doubtful.

The doubts, which an oath is made use of to remove, are either such as relate to our fidelity, in what we promise, or such as relate to our veracity, in what we affirm or deny. And oaths are accordingly divided into two sorts, promisory and assertory: the former

^wGrot. L. II. C. XIII. § I.

are designed to ascertain our fidelity in promises; the latter to ascertain the veracity of our assertions.

But in fact all oaths seem properly to be promisory ones: for when a person is sworn to tell the truth; in such an oath a promise to tell the truth is implied, and this promise is in reality what he swears to. When a witness is sworn in a court of justice, that the evidence, which he gives, shall be the whole truth and nothing but the truth; he, by consenting to swear under this form, plainly consents, or in effect promises, to speak the truth. If he is sworn to give true answers to all such questions, as shall be asked of him; his agreeing thus to swear contains or implies a promise, that his answers shall be true.

The distinction between assertory and promisory oaths is usually placed in the different time of the fact sworn to. All facts are either past, present, or future. Those only are called promisory oaths, which ascertain the existence of future facts: and those are called assertory oaths, which ascertain the existence of past or present facts.

But neither will this distinction preserve a difference between them: for when the juror engages, that he will tell the truth, as far as he knows it, in relation either to past or to present facts; though the oath may be said indirectly to ascertain the existence of such facts, yet what it ascertains directly is the future fidelity of the juror in relating those facts.

Obliga-
tion to
fidelity.

II. Before we proceed any farther in our enquiry concerning the nature of oaths, and the obligation, which arises from them; it may be proper to say something concerning the general reason of our obligations to fidelity and to veracity, that is, our obligations not to falsify either in what we promise, or in what we affirm or deny.

The obligations to fidelity have been explained already under the heads of promises and contracts : and the immediate cause of these obligations has been shewn to be our own consent. Every breach of fidelity, either in promises or in contracts, is a violation of that right, which by our own consent we conferred upon him, to whom we promised, or with whom we contracted.

It would be an idle question to ask, from whence the obligation arises to mean what we say, or to consent with our minds to what our words express. In our intercourse with mankind, the settled marks of our intentions are always understood to stand for our intentions themselves. The demands, which others have upon us, do not rise from the mere intention of the mind, which can be known no otherwise, than as it is expressed in our words or in our actions : they arise from our intentions so made known : and consequently they extend as far as our intentions are made to appear by our words or actions. So that if we do not comply with what we have thus expressed, we are guilty of injustice towards them, to whom we have given such demands, or, to speak more exactly, to whom we have given a right to make such demands.

III. The obligations, that we are under to speak the truth in what we affirm or deny, have been rendered less obvious by the several supposed allowances of dissembling or falsifying. * Grotius supposes the general notion of a lye to consist in speaking, or in writing, or in using any other outward signs, in such a manner, that what we speak, or write, or otherwise signify, cannot be understood in any sense, but such an one as is different from our real thoughts. But then, as he rightly observes, something farther must be added to this general notion of a lye, to make it naturally unlawful : for there is nothing contained in

Obligation
to veracity.

* L. III. C. I. § XI.

this description of it, which will shew it to be so. Indeed words or gestures have their significancy given them by use or custom, which may be looked upon as a general agreement. The consequence of which is, that if I would have my mind known, I am under a necessity of using such words, or such gestures, as by custom or general agreement have been made expressive of my thoughts. But a custom or agreement, which has done nothing more, than give words or gestures their current significancy, can never bind me to make my mind known. The established meaning of certain gestures, or of the words of that language, in which I speak or write, will force me to use those gestures or words agreeably to this established meaning, if I have a mind that the person, to whom I use those gestures, or to whom I speak or write, should know my thoughts.

But this is not the question. The question is, why I am obliged to let him know my thoughts. The general consent, which established the significancy of words or gestures, does not oblige me to this: because I can comply with this establishment, and yet can at the same time not only conceal my thoughts, but make him believe them to be different from what they are. I can use words or gestures according to that meaning, which custom has given them, though it is even contrary to what I have in my mind. A man asks me, which way Titius went? I know that he is gone northward: if I have a mind, that he should know it too; the general agreement, which has established the meaning of words or gestures, will force me to say, that he is gone northward, or to point that way. But if I have no mind, that he should know it; that general agreement will not oblige me to use these words or gestures. I use such words and such a gesture, as is consistent with this general agreement, if I point the contrary way, or say, that he is gone south-

ward ; upon supposition, that I have a mind the enquirer should think, that he went a contrary way to what I know him to be gone.

Now the difference, which Grotius adds to the general notion of a lye, to make it unlawful, is its inconsistency with some right in the person, to whom I direct my discourse, to whom I write, or to whom I make use of any gestures, to which custom has given a significancy. Upon these principles all lyes do not seem to be naturally unlawful, those only seem so, which are inconsistent with some right either perfect or imperfect in those persons, with whom we are conversing. But because the word lye is so hateful, ^y Puffendorf, though he differs in fact very little from Grotius, distinguishes falsehoods of speech, not into lawful and unlawful lyes, but into lyes and untruths. A lye, says he, consists in making our words or other signs bear a different sense from our real conceptions ; where the person, to whom these words or signs are directed, has a right to understand, and to judge of those conceptions, and we on our part are obliged accordingly, to make him apprehend our meaning. Whereas an untruth consists in applying our words or other signs in such a manner, that the person, to whom they are directed, shall conceive from them a different sense from what we have in our mind ; when that person has no right to know our thoughts, and no man is prejudiced by our concealing them.

It is allowed then by these two judicious writers, and cannot, I think, be denied by any one, that where the person, to whom we direct our discourse, has any right to know our real thoughts, it is unlawful to falsify. But when I direct my discourse to a man, or behave towards him, whilst I am discoursing, in such a manner, that all the world, who heard and saw me,

^y Puff. B. IV. C. I. § IX.

would conclude, that I designed to inform him of the truth ; do not I, by such discourse and manner of behaviour, tacitly consent to inform him of it ? Though therefore he might have no previous right to such information ; yet this consent of mine gives him a right at the time : and I should act contrary to this right, so conferred upon him by my tacit consent, if I was to tell him a falsehood. This principle will leave us but few untruths, which are not to be ranked in the class of unlawful lyes : it will reduce to this class of lies, not only such falsehoods, as will directly injure a man, or hinder his innocent benefit ; but all such falsehoods likewise, as are inconsistent with that tacit consent to tell him the truth, which appears from our conversing with him, as if we designed to tell him it : because these falsehoods, as well as the other, will come under the description of being contrary to a right of his either perfect or imperfect.

It may perhaps be asked, whether this right of knowing the truth, which is only conferred by our tacit consent in the manner, that we have been describing, is of such a value, that it can be looked upon as an injury not to do what we have so consented to do ; unless there is some other damage done to the man, that we are conversing with, or to some one else, by our telling him a falsehood. Certainly in some cases it may be of no great importance to him, or to any one else, whether we deceive him or not. But then he who has engaged to another, is not at liberty to judge of that other's right : the party whose right it is to know the truth, may, if he pleases, release the speaker from this obligation : but without such a release it cannot be at the speakers option, whether he will comply with the obligation or not, upon pretence, that the hearers right is of small value. To allow such a

latitude as this, would effectually destroy, not only all obligations to speak the truth, but all obligations whatsoever : since the same latitude is full as reasonable in all other instances, as it can be in this.

IV. Let us now enquire what sort of concealments, or untruths, or dissimulation this principle will allow of.

What
conceal-
ments con-
sistent
with this
obligation.

First, it is not unlawful to conceal, by our silence, what we have no mind to discover ; provided the person, who wants us to make the discovery, had no previous right to know the truth. Where he would not be injured, or lose any innocent advantage by not knowing the truth, he has no right to know it, unless we give him one by conversing with him : and consequently, since our silence gives him no such right, we lawfully may be silent.

Secondly, it is not unlawful, even where we direct our discourse to a man, as if we designed to inform him of the truth, to speak what we know is untrue ; provided, we are sure, that he waves his right of knowing it. This, I suppose, is the reason, why it should not be thought wrong for a prisoner upon his trial to plead — not guilty ; though at the same time he is conscious of the contrary : because the court does not expect or desire to know the truth, unless they can make it out, without his immediate confession of it.

Thirdly, where we have put ourselves absolutely under the direction or authority of another person, that this person may by his authority over us, which we have so given him, obtain a certain purpose ; our rights, as far as the necessity of this purpose requires, are at his disposal. Whatever right therefore of knowing the truth we might acquire by his professions of telling it, or by his directing his discourse to us, as if he designed to tell us it ; the authority, which we have

given him, supercedes this right, as far as it would hinder the purpose, which he is to bring about. This is the case of physicians in respect of their patients, and of the commanders in chief in respect of the soldiers, who are under their authority.

Fourthly, as infants, or ideots, or madmen acquire no right by an express promise, so neither do they acquire any by our tacit agreement to tell them the truth, when we are discoursing with them. Upon this account it is not thought unlawful to deceive them by our words or actions, either for their own benefit, or to prevent them from doing any harm.

Fifthly, it is the established character of history to relate facts, as they really happened: they therefore, who undertake to write history, profess by so doing to speak the truth, and are for this reason obliged to speak it. But writers of fables, or relaters of parables, profess only to teach useful truths, under feigned stories or resemblances. They do therefore what they profess, and consequently, what alone they are obliged to do; if they take care to make their fables or parables useful and instructing; they are not guilty of any unlawful falsehood, though the facts, which they relate in their fables or parables, never happened.

Sixthly, there are some actions or other signs, by which we profess nothing; they are directed to no person for his information; but all, who see them, are at liberty to take them in what sense they please. Whoever is deceived by such signs, or actions, as these, cannot charge them, who make the signs, or do the actions, with falsehood. A student keeps his door shut, that he may not be interrupted. The appearance is the same, as if he was not at home. But the judgment, which any man would make, who found it shut, is not necessarily, that he is not at home, but either that he is not

at home, or would not have any one interrupt him. Of this sort are several stratagems made use of in war. Whoever is deceived by any feints of his adversary, cannot charge such adversary with any unlawful falsehood: because, if he knows any thing, he must know, that his adversary never designed or professed to give him information.

Seventhly, when we direct our discourse to any one, who knows the meaning of what we say, and a third person, who has no concern in it, listens to what passes between us, there is no unlawful falsehood in speaking so as to deceive him. He had no business to know what passed between us; and we did not address ourselves to him: he had therefore no previous right to be informed of the truth, and we gave him none at the time.

Eighthly, suppose a man enquires of me concerning some matter, which prudence would oblige me to conceal; because some damage might arise to me or to some third person from his knowing it: am I at liberty to falsify, in order to prevent him from knowing what I have such reasons for concealing? If he makes the enquiry inadvertently, there will be no great difficulty in the matter: by telling him, that it is an improper enquiry, we shall get rid of him, without being under any necessity either of answering his question, or of giving him untrue information. But if he makes use of any unjust force or fraud to find out what he ought not to know; as such injustice would hinder him from acquiring any right, even by a direct promise; so it would much rather hinder him from acquiring any by the indirect and tacit promise of telling him the truth, implied in our addressing our discourse to him, as if we designed to tell him it.

However it ought to be carefully remembered, that none of these concealments, untruths, or dissimulations

are allowable, when any causeless harm will be done, or any innocent advantage be prevented by them : because in all such cases the person, who suffers such harm or is hindered of such benefit, has a previous right to know the truth ; and though we were to give him none by directing our discourse to him, yet such previous right is violated, if we conceal the truth from him.

Affertory
oaths con-
firm an
implied
promise.

V. It is plain from the nature of promissory oaths that they are designed to confirm some promise. And the same may likewise be said assertory oaths, upon the principles, that we have been explaining. The general obligation to speak the truth, in what we affirm or deny, arises from some right in the hearer to know it. This right may be prior to our discourse with him ; he may have a right to be told the truth, if we tell him any thing : and then our addressing ourselves to him, as if we designed to tell the truth is the mark of our consent that this right shall take place. Or if there is no such prior right, yet the very addressing ourselves to him gives him a right to know the truth ; because it implies a tacit consent, that we will tell it. All assertory oaths therefore, being only designed to ascertain our veracity in what we affirm or deny, contain a promise either express or implied, that we will not falsify.

The general conclusion from what has been said is ; that oaths of all sorts are designed as confirmations of some express or implied promise. We are next to consider in what manner such a confirmation is produced by calling God to witness to the truth of what we say or promise, or by renouncing his mercy and devoting ourselves to his displeasure, if we falsify.

The na-
ture of an
oath.

VI. * The form of an oath, from whence alone we can learn what is the nature and essence of it, seems not always to be the same. Sometimes God is invoked as a witness to the truth of what we say ; and some-

* Grot Lib. II. Cap. XIII. § X.

times he is invoked as an avenger to punish us, if we falsify. But these forms, though they differ in words, have the same meaning. To invoke God, either as a witness or as an avenger, must in effect be the same thing : since what is doubtful can no otherwise be ascertained, by calling upon him to attest it, than because, as we are under his absolute authority, he can, and, as we believe, he will punish us, if we do not speak the truth.

If we would examine farther into this point, we must observe, that some writers have imagined, what would have depended upon our own testimony only, if we had simply affirmed it, to be therefore rendered more certain, when we have sworn to it, or called God to witness to it, because the truth of it is then evidenced by the testimony of God. But this account of an oath cannot possibly be applied to such oaths as are promisory.

If I make a promise, and then call upon God to witness to the promise, supposing me to mean no more by this than barely to call him as a witness, I have done nothing towards rendering my fidelity less suspected than it was before. What is the effect of his testimony, considered merely as a testimony ? Is it designed only to evince, that I have made such a promise ? This is needless ; because the person, to whom I have made the promise, wants no such evidence to prove the truth of this fact : he knows it already by the help of his senses, and cannot want to be made more certain of it, than he is. The matter in doubt is, not whether I have made such a promise, but whether I will faithfully keep it. And I confess, that I cannot see how the testimony of God, considered merely as a testimony, can evince my fidelity ; unless, when he is so called upon, he would shew by some miracle, that he knew I would not break my word.

But if, when I call him to attest my promise, I mean to make him a guarantee to see to the performance of it, and to punish me if I break it; I have then given the person, to whom I swear, a surer pledge, or a stronger assurance of my fidelity, than if I had simply promised without an oath. The fear of incurring Gods displeasure, to which I have devoted myself by calling upon him to see to the performance of my promise, will make me less likely to break my word, than I possibly might have been, if I had not by an oath laid myself open to this fear.

Since then this notion of an oath, that God is merely invoked as a witness, cannot be applied to promisory oaths, so as to produce any effect in ascertaining what what would be otherwise doubtful; since all oaths, even those, which are usually called assertory ones, contain either an express or a virtual promise; and lastly since an oath, according to the common opinion of mankind, is made use of to ascertain what might otherwise be doubtful; we may conclude, that this notion of an oath is not agreeable to the common opinion or common sense of mankind.

But suppose we neglect the tacit or express promise in those, which are usually called assertory oaths; I know not, even upon this supposition, how the truth of what is affirmed, concerning past or present facts, will be better ascertained with an oath, than without it: if an oath is considered merely as an invocation of God to be a witness, either to the truth of the fact or to the veracity of the juror. I am in doubt about a fact: a person affirms the truth of it; I am still in doubt about it; because I doubt the veracity of the person, who affirms it: he swears to the truth of the fact: if by so doing he only calls upon God to attest either the truth of the fact or his own veracity, my doubt will still re-

main. Can he say, that the truth of the fact, which was supported before only by his own testimony, is now supported by the testimony of God? or can he say, that the truth of the fact is still supported more immediately only by his own veracity, but that his veracity is now supported by the divine testimony? This is the point, which I am now in doubt upon. I know indeed, that he has, as he says, called upon God to attest either the truth of the fact or his own veracity; and if I had any evidence, that God did attest either of them, when he is so called upon, my doubt would be at an end. But there is no evidence at all of this; and consequently no more evidence, that the fact is true, after he has sworn to it, than there was before; if this was the whole notion of an oath; if we were to look no farther than the supposed testimony of God, supporting either the truth of the fact or the veracity of the juror. I have no more evidence, that God gives testimony to what he affirms, merely in consequence of his having called upon him to give such testimony, than I before had of the truth of the fact, merely in consequence of his having affirmed it.

Perhaps he might say, that after he has done this I can have little or no reason to suspect his veracity; because it would be such an affront to the truth and to the majesty of Almighty God, to be called upon to attest what is false, as all but the most abandoned villains would tremble at: his fear therefore of thus insulting and defying God, and of the punishment, which every sober man is sensible will be the consequence of such behaviour, is a sufficient security to me, that what he affirms upon oath is true, to the best of his knowledge. If he says this, I shall plainly understand how much stronger security I have from his oath, than I should have had from his bare assertion. But then this is the

very point, which I want to make good: if the fear of the juror, when he calls God to witness, is the security, which his oath gives me, of his telling the truth; then by calling God to witness, he understands, that God will punish him, if he falsify; or that calling him in as a witness, and calling him as an avenger amount to the same thing.

The most usual forms of an oath are express to this purpose. When oaths are administered amongst us in this country, the juror has the gospels in his hand, and one of the usual forms of an oath is, that after repeating the matter, to which he swears, he concludes with saying — so help me God, and the contents of this book; that is, may I receive the favour of God, and have a share in the mercies of the gospel only upon condition, that I observe my promise or speak the truth. The latter part of this form — and the contents of this book — is frequently omitted: but as the juror has his hand upon the gospels, when he repeats the shorter form — so help me God; — this gesture explains the meaning of his words, and shews it to be, that he is willing and desirous to be admitted to those helps or that favour of God, which the gospel has promised, only upon condition, that he does not falsify. These forms plainly shew, that the juror devotes himself to the displeasure of God by a solemn renunciation of his mercies in general, and of his mercies promised by the gospel in particular, if he does not make good what he swears to; whether it is to perform a compact, or to tell the truth. There are two forms of an oath mentioned by Livy, which may serve to shew us, that the jurors, amongst Heathens, as well as amongst Christians, were understood to devote themselves to the anger of their gods, if they broke their oath. In establishing an agreement between the

Romans and the Albans, Sp. Furius devotes the Roman people, if they first broke the agreement — ^a If the Roman people fail to make good this agreement ; do thou, O Jupiter, smite them upon that day, as I now smite this swine ; and smite them so much more, as thou art greater in power and might than I am — and having said this he struck a swine, which he held in his left hand, with a stone, which he held in his right. Hannibal, just before the battle with the Romans at the river Ticinus, having promised large rewards to his soldiers confirmed his promise with an oath of much the same form. ^b He held a lamb in his left hand, and a flint in his right ; and whilst he prayed to Jupiter and all the gods, that, if he failed, they would slay him, as he then slew that lamb, he struck the head of the lamb with the flint.

VII. ^c It was not uncommon, amongst the antients, for persons to swear by other things, without the mention of God, as by the sun, the stars, or the heaven ; by their own life, the life of their children, or the life of their prince. Oaths by the sun, the stars, or the heavens, seem to have been introduced, when these were imagined to be divinities. But such an oath in the mouth of a christian looks like profaneness : and I should not so much enquire, whether he was guilty of perjury in not keeping it, as whether he was not guilty of affronting God in taking it. Unless indeed where a person, out of reverence to the name of God, abstains from using it, and means, when he swears by heaven, to swear by that God, whom we have been taught to call our father, who is in heaven. ^d Sanderfon imagines, that to swear by our own life, or the life of our children, or the life of our prince, is tacitly swearing by that God, from whom these blessings were received. But certainly amongst the

Oath
where
God is
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tioned
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^a Liv. I. 24. ^b Liv. XXI. 45. ^c Grot. ut sup. § XI.

^d De juram. oblig. præl. I. § 4.

antients, who used these forms, this was not supposed to be the import of them. The juror meant indeed to invoke the divine vengeance upon himself, if he falsified; but he did this by devoting to destruction what was or what he pretended to be, of all things most dear to him. This which is the opinion of Grotius, appears to be true from some passages, that ^cPuffendorf has cited from the antients, for this purpose. When Regulus, as the story is related by Pliny, had persuaded Verania, that she should recover from her illness; she called for her will, and made Regulus her heir: it appears from the sequel by what sort of an oath he had attested the certainty of her recovery: for when Verania was soon after this in her last extremities, she exclaimed against him as a perjured villain, who had forsworn himself by the life and safety of his son. Plinys reflection upon it explains the intent of such an oath. Regulus, says he, makes use of this stratagem not more frequently than wickedly; whilst he every day deceives the gods, to whose wrath he has devoted this unhappy son of his. ^f Lyfias in one of his orations introduces the daughter of Diagiton and widow of Diodotus offering to swear by the children both of her former and her second marriage, that Diodotus had committed to the trust of Diagiton five talents; to which she adds, I am neither so abandoned nor so covetous, as to leave the curse of perjury upon my children for the sake only of leaving them a maintenance. When the king of the Scythians is sick, he sends, says ^g Herodotus, for three of the most approved publick diviners to enquire into the occasion of his distemper: and their usual answer is, that such or such a person has forsworn himself by the royal palace: for amongst the Scythians, this oath by the kings palace is reckoned of all others the most sacred. From this last

^c B. IV. C. II. § III. ^f Lf. edit. Tayl. p. 509 &c.

^g Herod. L. IV. pag. 243. edit. Gronov.

mentioned form we may collect, both that swearing by the kings palace was understood to be the same as swearing by the kings person; in like manner as our Saviour interprets an oath by the temple to be an oath by him, that dwelleth therein. And we may from thence collect likewise, that such an oath, by the kings person, was understood to devote his person to some calamity, if the juror falsified.

VIII. It may perhaps be asked what greater security we have of a man's veracity or fidelity in respect of what he promises or affirms upon oath, than we should have had, if he had only affirmed or promised the same thing without swearing to it. Falshood and perfidiousness are crimes against the law of nature, as well as perjury. If therefore either the love of what is right, or the fear of being punished for doing what is contrary to the law of God, is what restrains any one from falsifying, when he is upon oath; will not the same love of what is right, or the same fear of being punished for what is contrary to the law of God equally restrain him from being false or perfidious, when he is not upon oath? — The great security, which an oath gives us of his veracity or fidelity, who takes it, arises indeed, as is here supposed, from his fear of offending that Almighty Being, by whom he swears, if he is guilty of falsifying. And it must be farther owned, that a wise and a good man will be afraid of falsifying, even though he has taken no oath; lest by so doing he should offend the same Almighty Being. But then these are different degrees of fear: the fear of perjury is upon two accounts naturally greater than the fear of simple falshood. First, because perjury is the greater crime of the two; since falshood is only a breach of the laws of God; whereas perjury is a direct insult upon him and sets him at defiance. And second-

What security an oath gives of the truth of what is sworn to.

ly, because he, who is simply guilty of falshood, has room to entertain hopes of forgiveness: whereas he, who is guilty of perjury, has devoted himself to the displeasure of God, and precluded himself from all such hopes of forgiveness by renouncing his mercies.

Credit
due to an
idolaters
oath.

IX. ⁱ From considering the principle, upon which our assurance of a man's fidelity or veracity depends, when he is upon oath, we may be able to judge what credit is to be given to any one, who has sworn by a false god.

But in determining this question it will be necessary to enquire, whether the juror believed the being, by which he swore, to be the true God. If he did not, then he certainly would not be afraid of offending what he knows has no power to hurt him, if he does offend: his oath therefore would not in the least ascertain his fidelity or veracity. He might too perhaps, if he should falsify, acquit himself of the guilt of perjury: but then he should remember, that though it could not properly be called an insult upon God, and a defiance of his power, to break such an oath, yet it was the highest insult upon him to swear in this manner. It was in fact nothing less than idolatry; for an oath is an act of religion, which implies, that we acknowledge the being, upon whom we call as an avenger of our falshood, to have infinite wisdom and infinite power; such wisdom however, as can search into our thoughts, and know whether we do falsify or not, and such power, as can finally exclude us from all happiness if we do. He therefore, who swears by a false god, knowing it to be such, ascribes by this act such knowledge and power to the being, by whom he swears, as belongs only to the true God, and as cannot without the crime of idolatry, be ascribed to any other being.

But if the juror is firmly persuaded, that the being, by which he swears, is the true God, we have,

notwithstanding the idolatry both of his general persuasion and of his particular act, the same assurance of his fidelity, that we should have of a Christians fidelity, who believes in the true God and has sworn by him. The Christians fear of the consequences of perjury is our security, that he will not falsify, and is the foundation of that credit, which he obtains upon his oath : and as the Pagan, from his persuasion of the wisdom and power of the being, by which he swears, is under the same fears ; we have the same security of his not falsifying : his oath therefore deserves upon the same foundation to obtain the same credit.

Whether the true God will punish a Pagan for perjury, when he has forsworn himself by a false god, is a question of theology rather than of natural law, and is certainly, however divines may decide it, quite foreign to the point now before us. Our assurance of the Pagans veracity rests upon the same foundation, in whatever manner this question is determined : it rests upon the persuasion of his own mind, and upon his fears, which arise from that persuasion ; and not upon the future sentence to be passed upon him by the true God, of whom he is ignorant, and whose counsels never come into his deliberation, when he considers the consequence of his perjury.

X. It is most convenient, that the juror should take the oath in his own person, and not by proxy : because by going through the solemn outward acts, with which an oath is commonly attended, and by repeating the words of execration ourselves, we are more likely to be affected with a due sense of what we are about ; than if another person was to go through the form and to repeat the words for us. But otherwise there is nothing naturally wrong in allowing an oath to be taken by proxy : since, as I could renounce the divine

Oaths.
may be
taken by
proxy.

mercy and imprecate the divine vengeance in my own person, so I can empower another to do it for me : and what he does, who is so empowered, is as much my act and binds me as effectually, as if I had done it myself.

Oaths and
vows how
distinguish-
ed.

XI. Before we go any farther in our enquiries concerning the nature and effect of oaths, it may be proper to take notice of a distinction between oaths and vows.

By what has been said already concerning an oath, it appears, that by an oath God is called upon to see to the performance of what we promise, or to the truth of what we affirm, and to punish us, if we are found to be perfidious, or false. So that an oath does not properly contain in it any new and distinct obligation, but only confirms the obligation of some other act. If I make a promise to a man, and he accepts it; I am obliged to performance. If he is doubtful about my fidelity, and, in order to remove his doubts, I swear to my promise; I do not by this act lay myself under any new or distinct obligation, but only strengthens the obligations under which I had laid myself before: and this I do by introducing the Deity as a third party in the obligation, or rather as a guarantee of the pact, to see to the performance of it. The effect then of an oath is to annex a peculiar penalty to some other obligation: the juror renounces Gods mercy, or devotes himself to Gods displeasure, if he does not make good that other obligation.

This effect of an oath is what we mean by the obligation of it. So that, when I speak of the obligation of an oath, I would not be understood to mean any separate or distinct obligation, but only the effect of it in strengthening some other obligation, to which it is joined.

But a vow is a pact, in which there are no others concerned besides God, and the person who makes the vow. It is a promise made directly to God himself, and is therefore such an act, as produces a distinct obligation upon the maker of it.

Some oaths may indeed, from the form of them, produce an obligation, where the juror would otherwise have been under no obligation. This is the case in assertory oaths, where the person, who takes the oath, might otherwise have been silent, and consequently would not have been obliged to tell the truth, if he had not sworn to tell it. But then in forms of this sort we must observe, that, besides the oath itself, there is a promise contained, and such a promise, as would have been obligatory, if it had been expressed in such words, as would have separated it from the oath. So that the oath introduces an obligation no otherwise, than by being accidentally included in the same form of words with the promise, from which the obligation properly arises. A form of words, which is suited to the purpose of my swearing to tell the truth, contains both a promise, that I will do so, and an oath confirming such promise.

XII. ^k An oath produces no effect, where it is not attended with such outward circumstances, as plainly shew, that he, who goes through the form of it, intends to swear. How far his want of inward intention may affect his obligation shall be considered presently. This seems to be so certain, as to make it ridiculous to imagine on the contrary, that he, who repeats the words of an oath, when the occasion of doing this, or the manner of doing it, shew him to have no intention of binding himself, should, notwithstanding this, be bound merely by repeating those words: as if the words of an oath acted like a charm, and could not pass through a man's mouth, upon any occasion or in any manner, without binding his conscience. A clerk in court dictates to me the very words, which I am to say in taking an oath, and without mentioning my name speaks throughout in the first person, because I,

No effect
of an oath
unless
there are
outward
marks of
an inten-
tion to
swear.

^k Grot. *ibid.* § II.

who am to repeat the words after him, am to speak in this person: the occasion of his doing this would sufficiently shew, that he had no design of swearing himself; that I, and not he, am the juror; and that whatever is the matter of the oath, I, and not he, am bound to the performance of it.

However in most cases, all ambiguity of this sort is effectually provided against by speaking in the second person, and telling the juror what he is to swear, without making him repeat the words: or because, where the oath is long and the matter of it various, it may be the better impressed upon his mind, if he is made to repeat them, his name may be inserted to ascertain that he is the juror. And in either case, in the solemn form of an oath, besides repeating the words, some act likewise is to be done by the juror, such as holding the gospels, kissing the book, lifting up his right hand, putting his hand under the thigh of him who imposes the oath. Such oaths as these, from the corporal act of the juror himself, are called corporal oaths: and this act, whatever it is, sufficiently fixes who the person is, that intends to swear.

Want of inward intention, where there is the outward mark of it, does not prevent the effect of an oath.

XIII. ¹ But may it not be asked, whether the juror is obliged by his oath, or incurs the guilt of perjury in breaking it, supposing him to go through all the formality of swearing, as to the outwards acts, in such a manner, that all, who see and hear him, would conclude, that he intends to swear, but to have in the meantime a reserve, of not intending to swear, in his own mind. A simple promise, in the same circumstances, would undoubtedly be binding: because those outward signs, which either nature suggests or custom establishes for expressing or publishing our intentions, stand in the place of the intentions, which they so express. The juror therefore, notwithstanding his inward reserve, is certainly under the obligation of his promise. And the

¹ Grot. *ibid.* § III.

only doubt, that there can be, in regard to the effect of his oath, arises from hence: mankind have no way of knowing one another's thoughts, but by means of the outward signs which are made use of to express those thoughts: upon that account our obligations or our claims, arising from consent, can be ascertained no otherwise, than by the intention, which appears; and no regard can be had to any other intention. But the case may at first sight appear to be otherwise in respect of God. He knows the innermost thoughts of our heart, though we express them by no outward sign at all; nor can he be misled to judge them to be what they are not, though we should make use of such outward signs as custom has made to signify what is directly contrary to our meaning, when we use them. Since therefore the effect of an oath, like all adventitious obligations, depends upon our intention, as far as it is known to the party, with whom we are concerned; and since the party, with whom we are concerned in oaths, is God, who knows the true intention of our hearts; it may seem at first sight, that the want of an inward intention to swear will prevent the oath from producing its effect; notwithstanding we make use of such words or other signs, as might make us appear outwardly to have an intention of swearing. But here it is to be remembered, that the effect of all oaths is to confirm some human pact, some contract or some promise, either express or implied, between man and man. God is called in, not in order to produce any new obligation, but only to strengthen the obligation of such human pact. It is to be remembered farther, that, in the very oath itself, the juror agrees with the person, who imposes or who accepts the oath, to call God in as a party to their obligation. Thus then an oath, in all views of it, though it calls in God as a party, is in itself only part of a human pact: and confe-

quently, as in all other pacts between man and man, so likewise in an oath, the outward declarations stand in the place of the jurors intention ; and if he falsify in respect of what is expressed by such outward declarations, he is guilty of perjury, whatever secret reserves he might have in his own mind.

Oath is void, when the pact is so, with which it is joined.

XIV. From what has been said it sufficiently appears, that the proper matter of all oaths is some other obligation. What we swear to, is some promise or contract, either express or implied ; and the obligation of such promise or contract, which the oath is intended to confirm, is the matter of the oath. When therefore the promise or contract is void, which the oath was made use of to confirm, there can be no effect of the oath ; or, to speak in the common language, there can be no obligation arising from it. For where there is no obligation from such promise or contract, the oath has no matter, and of course can produce no effect. We swear to make good some particular obligation : therefore where that obligation is void, or where there is no obligation, we swear to nothing.

^m Upon this principle all oaths, which are obtained by fraud, are void ; if the fact, in which the juror is deceived, was the whole ground or reason of his swearing : for we have seen already, that such erroneous pacts are void in themselves. In like manner all oaths to the performance of what is impossible or unlawful are void : because the pacts are so, which such oaths are made use of to strengthen. For the same reason, where an extorted promise is void, the promiser, though he should be sworn to performance, is not affected by the oath.

But in the case of oaths, which arise from fear, we must distinguish, as we did in the case of promises. Whenever a promise, which arises from fear, is binding upon the promiser, an oath, arising from the same cause

^m Grot. *ibid.* § XIV.

and applied to confirm such a promise, will have its full effect. All oaths therefore, which are extorted by any just fear are binding; and so likewise are all such as arise even from unjust fear, provided the person, to whom we swear, had no hand in the injustice.

XV. ⁿ It is sometimes enquired, under this head, whether we are bound by an oath, which we swear to a robber. Those, who maintain such an oath not to be binding, are apt to confound two other questions with this; though they are very different from it. They either invent some unlawful matter for the oath, and then conclude it to be void; or else they set aside the obligation of it upon an arbitrary supposition of its having been unjustly extorted. But in the true state of this question the matter of the oath and the manner of procuring it are no way concerned. It is one thing to enquire, whether an oath to this or that purpose is binding; and another to enquire whether an oath, without considering the purport of it, is therefore void, because the person, with whom we are concerned, is a robber. The former enquiry relates to the matter of the oath, the latter relates only to the character of the person, to whom we swear. So again; It is one thing to enquire whether an oath unjustly extorted is binding; and another to enquire, whether an oath is binding, merely because the person, to whom we swear, is a robber, without considering whether he extorts it or not. The stress of the present question, when stripped of all circumstances, which do not belong to it, rests upon this single point; since a robber is a common enemy of mankind; can any oath, though the matter of it should be lawful, and though there is no particular injustice in the manner of obtaining it, oblige the juror? The character of the person, to whom we swear, is the only circumstance to be considered: and the question

Oath to a
robber is
binding.

ⁿ Grot. *ibid.* § XV.

is, whether, as there is no intercourse of social ties between him and the juror, he can have any claim in consequence of the jurors oath.

When the question is thus stated, the obvious answer seems to be, that such an oath is binding, notwithstanding the character of him, to whom we swear. If there is nothing unlawful in the matter of the oath, nor any injustice in the manner of procuring it, the character of the robber does not at all enter into it, and for that reason cannot at all affect it. To urge, that he has broken all social ties, and that consequently he can have no claim arising from the natural connection of mankind with one another, is nothing to the purpose: because the claim in question is not such an one as naturally arises out of any social connections with him, but such an one, as we give him by the particular act of swearing to him voluntarily for some lawful purpose. He may indeed, by having, as it were, declared war against all mankind, have deprived himself of all his former claims: but it does not appear from hence, that it is become impossible for him to acquire any claim, though we are ever so willing to give him one, and though there is no injustice either in our giving him such claim, or in his procuring or accepting it.

° Grotius indeed carries this matter farther, and maintains, that if our oaths are not directed to man but to God, that is, if our engagements are properly vows and not oaths; or if they are indeed such, as tend to confer a claim upon them, to whom we swear, but any thing can be objected to that claim, so as to set it aside; which is the case where an oath is extorted; we are then obliged to make good what we have sworn to, not in virtue of their right, to whom we swear, because, by the supposition, they have no right, but in regard to God, by whom we swear. If this reasoning was just,

° Grot. *ibid.* § XIV.

an oath given to a robber, not only when he has procured it fairly, but when he has extorted it by unjust fear, would be binding upon the juror.

To clear up this matter we will first suppose our engagement to be properly an oath: where besides the appeal to God, there is the appearance of some right or claim conferred upon the party, to whom we swear. If this right or claim is void in itself, or if any thing can be opposed to it, which would set it aside, so that the promiser, if he had not sworn, would not have been bound to performance; yet if he has sworn, the oath, says our author, will bind him. Now this decision plainly proceeds upon this false principle, that the oath is a distinct covenant in itself, and not a part of the pact, which it is intended to confirm. But the true notion of an oath, as already explained, shews that it is no such distinct covenant, that it does not properly contain in it the notion of an obligation, if we separate it from some other obligatory pact, with which it is joined: the obligation of it amounts to no more, than the addition of an extraordinary penalty, if we falsify in that pact. If therefore we take away the obligation of the pact, to which such penalty has been annexed by swearing to it; what becomes of the penalty, that is, of the obligation of the oath? I make a promise or engage in a contract: by this act I oblige myself to do or to give something. I swear to this pact; the oath strengthens this obligation, by subjecting me to an extraordinary penalty, if I do not act conformably to my obligation. But by some flaw in the pact there happens to be no obligation arising from it: how therefore do I incur the penalty annexed? I am subject to it, if I do not do what I was obliged to: but I am, on account of that flaw in the pact, obliged to nothing; and consequently, let me act as I will, I am clear of the penalty.

If we suppose, what is not true, that the oath is an obligatory act distinct from the promise or contract confirmed by it; the obligation of an oath, in this view of it, is between God and the juror; so that it will in effect amount to a vow. We shall therefore see how the case would stand upon this supposition, if we consider what would be the effect of a vow in such circumstances. Suppose therefore a vow to be unjustly extorted; does such vow bind the person, who is thus forced to engage in it? To determine upon this question, it will be necessary to observe, that as a promise made to a man does not oblige, unless he, to whom it is made, accepts it; so neither does a vow, which is a promise made to God, oblige, unless God accepts it. Whenever therefore we have sufficient reason to believe, that God does not accept a vow, such vow is not binding. Now the case supposes some damage to arise from the vow to the party engaging in it; which damage is the effect of the other parties injustice, who extorts it by the use of force. I cannot therefore see what grounds there can be to imagine, that God accepts such a vow, unless we would make him a party in the injustice, and suppose, that he consents to the damage, which must be sustained by the performance of it.

Effect of
an oath
does not
extend to
the juror's
heirs.

XVI. ^P Whatever effect there is in an oath, merely as an oath, or as it subjects the juror to the guilt of perjury, if he falsifies, this effect does not descend to the heirs of the juror. It has indeed been shewn elsewhere, that as far as any contract, which has been confirmed by an oath, affects the goods of the juror, such contract will bind his heirs. But then it does not bind them under the penalty of perjury: because an oath is a personal appeal to God; it is an act, by which the person, who makes this appeal, imprecates the divine displeasure upon himself, or renounces for himself the

divine favour, if he does not perform what he swears to: and consequently the penalty of incurring the divine displeasure, or of forfeiting the divine favour, if the oath is not kept, is merely personal, or does not affect the jurors heirs.

A man may endeavour to extend this penalty farther, by wishing a curse upon his heirs, by imprecating the divine displeasure upon them, or by renouncing the divine favour towards them, if they do not perform what he has sworn to. But whatever fear superstition may produce in them upon account of such an execration; it is very evident, that reason and religion would shew it to be impossible for any one to renounce the favour of God and the hopes of his mercy for any one but himself; and consequently that the penalty of perjury is confined wholly to himself, however he might endeavour to extend it to his heirs.

XVII. When we threaten to do any causeless harm, and swear to put those threatenings in execution; it is plain that such an oath confers no right at all upon any one. It certainly confers no right upon the person who is to suffer this harm; or if we could imagine it to confer any, we may be sure it is such a right as he very readily gives up; because we are sure that he, like all other men, is desirous to keep free from suffering harm. And if we have engaged to do him this harm by a promise made to some third person, which promise we have sworn to; this promise is void. If therefore we apprehend ourselves to be bound unto the penalty of perjury to do such harm, it must be by an obligation to God, in the way of a vow. But the matter of such oaths, even in this view of them, will always be sufficient to set them aside; since we may be certain that God does not accept them. So that the juror, though he is guilty of profaning God's name by thus swearing, is not guilty of perjury by not doing what he has sworn.

Oaths to
do harm
not bind-
ing as
vows.

C H A P. XV.

Of Marriage.

- I. *Marriage what.* II. *Polygamy inconsistent with the notion of marriage.* III. *The case of polygamy under and before the Mosaic law.* IV. *Polygamy forbidden by the gospel.* V. *Divorce forbidden by the law of nature.* VI. *In what manner adultery dissolves marriage.* VII. *Ill usage does not make a marriage void.* VIII. *A second marriage is a nullity, where a former subsists.* IX. *Want of consummation in what instances it voids a marriage.* X. *Marriages between relations how made invalid.* XI. *Force may make a marriage a nullity.* XII. *The effects of an error in the contract of marriage.* XIII. *Want of parents consent not always sufficient to make a marriage void.* XIV. *Husbands authority whence it arises.* XV. *What concubinage is a good and valid marriage.*

Marriage
what.

I. **M**ARRIAGE is a contract between a man and a woman, in which by their mutual consent each acquires a right in the person of the other, for the purposes of their mutual happiness and of the production and education of children. Little, I suppose, need be said in support of this definition ; as nothing is affirmed in it but what all writers upon natural law seem to agree in. I have mentioned indeed no more parties, than a man and a woman : but I would not be understood by this way of expressing myself to take it for granted in the definition of marriage, that it is naturally unlawful for the same man to marry more women than one : this expression is consistent enough with such polygamy ; because if he marrys ever so many, each

contract is only between a man and a woman. I have defined marriage to be a contract; because mere cohabitation is never, that I know of, called by this name. And the ends or purposes, which I have assigned; the mutual happiness of the parties, and the production and education of children; seem on all hands to be looked upon as the most natural ends of this contract. We will therefore proceed to consider what determination this notion of marriage will lead us to in some of the principal questions relating to it.

II. ^a The chief points, about which moralists differ, are polygamy and divorce. Some contend that the law of nature does not make it necessary, for only one man and one woman to be parties in the marriage contract, but allows the same man to engage, in this manner, and for these purposes, with as many women, as he finds convenient. And they contend farther, that the same law does not require this contract to be perpetual, but allows it either to expire at such a time as the parties shall agree upon at first, or to be dissolved at any time by their mutual consent. Others maintain on the contrary, that the law of nature forbids polygamy, or does not allow a man to marry a second wife, whilst the first is living; and that the same law likewise forbids divorce, or does not allow the contract of marriage either to be made temporary from the first, or to be dissolved at the discretion and by the consent of the parties afterwards.

Polygamy
inconsistent
with
the notion
of marriage.

We will first examine the question concerning polygamy. And in order rightly to understand this matter it will be necessary to observe, that whatever is inconsistent with the right, which each party gives to the other, by the contract of marriage, is inconsistent with the contract itself, and cannot be considered as a part or condition of it. And since the law of nature forbids

^a Grotius L. II. Cap. V. § IX.

us to break our contracts; it follows, that supposing polygamy is inconsistent with what we agree to in the contract of marriage, with the right which each party gives the other in his or her person, then polygamy must be inconsistent with the law of nature. The man and the woman, who are the parties in a contract of marriage, give to each other a mutual right in their respective persons. What right the man naturally has in the person of the woman, or the woman in the person of the man, is to be determined by the natural ends or purposes for which this mutual right is given. If then upon examining this right by those ends or purposes, it shall be found to be inconsistent with polygamy; the consequence will be, that by entering into a contract of marriage, or by giving each other such a right, they have precluded themselves from polygamy by the very act of marrying, though they should not preclude themselves in express terms. Because it is impossible to suppose them to will or intend contrarieties at one and the same time: if they have a will or intention to give each other such a mutual right in their respective persons, this will or intention effectually precludes them from willing or intending, at the same time, whatever is contrary to such right. We may go one step farther. As the liberty of polygamy is tacitly taken away by the contract of marriage, when nothing is particularly said about it, supposing, that upon enquiry we find such liberty to be inconsistent with the mutual right conferred by the parties; so likewise, upon the same supposition, the parties cannot give each other this liberty by any express conditions annexed to the contract for this purpose, at the time of making it: because if the contract itself is binding, all conditions, which are inconsistent with the obligations of such contract, are void; or if on the other hand these conditions are considered

as binding, then they will set aside the contract or make that void: so that wherever there is a valid marriage, it takes away the liberty of polygamy or makes it unlawful; and wherever the man and the woman have so contracted as to allow of polygamy, if I may call it so, there is no valid marriage. In order therefore to shew, that polygamy is naturally unlawful, or that the parties, by their mutual consent in marriage, have precluded themselves from the liberty of marrying any one else, whilst this contract continues in force; we are to shew, that it is inconsistent with the mutual right, which each of them has consented to give the other in his or her person.

Polygamy may be considered as of two sorts; it is either a contract of marriage of one woman with any number of men more than one: or a like contract of one man with any number of women more than one. As to the first sort of polygamy; I do not find, that the writers, who favour polygamy the most, undertake to defend it. They seem to be agreed in maintaining, that the same woman ought not, at the same time, to have more husbands than one; or that, in marriage, the woman is naturally obliged to give the man such a full right in her person, for the purposes of marriage, as not to leave herself at liberty to dispose of her person, for the same purposes, to any one else, whilst he is living. We may therefore take it for granted, that a woman, when she marries a man, binds herself not to have children by any one else, and to contrive only for his happiness, as a husband, exclusively of all others; that she binds herself to admit none besides him to share in her bed, or in her conjugal affection. This then being allowed to be the obligation on the womans part, there cannot at first sight, one would think, appear to be any reason for imagining the obliga-

tion on the man's part to be different from it. When two people gives each other a mutual right in their respective persons; the most natural conclusion is, that the right given is equal on both sides; if there is no express reserve to the contrary. Whatever liberty the woman parts with for the benefit of the man; it is natural, that he should receive an equivalent from him, or that he should part with as much liberty for her benefit. Unless therefore some exception is particularly agreed upon between them; he must be understood in marriage to give her the same right in his person, which she gives him in hers; that is, a full right to it for the purposes of having children, and of their mutual happiness; so as to make the effect of the contract the same on his side, and on hers, by binding himself not to admit any, besides her, to share either in his bed, or in his conjugal affection.

It may be said indeed in reply to this conclusion, or rather to the premises from whence it is deduced; that the reason, which lays the woman under restraint in this particular, does not extend to the man. She is not allowed to have more husbands than one; because if she had, amongst many husbands, it would become uncertain, to which of them any child or children of hers belong. Whereas there is no danger of any uncertainty, in the issue, from a man's having more wives than one: because each of the wives cannot but be sure which child is her own, and which is anothers. But when this is urged as a reason, why, though the man has naturally an exclusive right to the person of his wife, yet we cannot from thence conclude, that the woman has likewise naturally an exclusive right to the person of her husband; they who urge it, should remember, that ascertaining the issue of the man, is so far from being the only end, that it is not the principal end,

which even he proposes ; and much less can we imagine the woman to have no other end in view, but to make the man certain what children are his. And nothing is plainer, than that the nature of an obligation, arising from a contract, can never be determined by a consideration, which is but a secondary one in the intention of one of the parties, and which never entered at all into the intention of the other. The principal end of each party is the production of children from the body of the other, and the happiness, which each expects in the conjugal affection of the other. But if these are the ends, which they mutually propose in contracting to be man and wife, it can never be shown, that the woman, exclusive of all others, has not the same right to have children of his body, and to enjoy his conjugal affection, that the man, exclusive of all others, has to have children of her body, and to enjoy her conjugal affection. The happiness of the woman is of as great importance to her, as the happiness of the man is to him : and she is under no previous obligation to consult his happiness either solely or principally, any more than he is to consult hers. There is therefore no natural reason for imagining, that the contract of marriage should have his advantage more in view than hers, or give him a greater advantage, than it gives her. If each party has an equal advantage in view, they consent only upon condition of obtaining an equal advantage : and their consent upon these terms will not make the obligation of one of them different from the obligation of the other.

The only way therefore, that is left to make polygamy lawful on the mans part is by some express condition annexed to the contract. But such a condition, if it is inconsistent with the ends proposed in the contract, cannot be annexed, so as to be binding on the woman, without destroying the contract. Now the happiness

of the parties in their married state is one of the principal ends of marriage. But if domestic happiness for herself is the end, which the woman proposes, and which engages her to enter into the contract of marriage; she consents no otherwise to give the man a right to her person, but upon condition of his obliging himself to contrive for her quiet and happiness in the married state, as far as he is able. It is unnatural and absurd to suppose, either that the woman has not this in view, or, if she has, that she should consent to give him a right to her person upon any other terms. And if the man consent to take her upon these terms, it is evident what obligations arises on his part from such consent. Now no reason can be given, why the contract of marriage should not be so far like other contracts, that whatever discharges the parties on the one side from their obligation, should at the same time discharge the parties on the other side from theirs, and make the whole contract a nullity. But this is the effect of a liberty of polygamy granted to the man, even with the express consent of the woman: it releases him from the natural obligation of promoting her domestic happiness, as far as is in his power: and consequently, by releasing him from his obligation, it makes the contract itself a nullity from the beginning. So that, notwithstanding where there is such a liberty, there may be cohabitation, there can be no marriage. I need not, I suppose, set forth the jealousies and quarrels, which are almost unavoidable, where the same man has more wives than one: the fact, without enlarging upon it, is evident enough to convince us, that he, who shall thus cohabit at the same time with a number of women, is far from making the best provision, that he can, for the domestic happiness of any one of them. Taking then this fact along with us, we may see how little force

there is in what is sometimes urged in favour of polygamy; that no injury is done to the former wife by marrying a second in her life-time, if she has consented to it; since the husband cannot do her an injury by giving her only a part of his affection, when she has beforehand agreed to let him divide his affection between her and others. The effect of allowing such a liberty to him would not be to make it lawful for him to enter into a second marriage, the first still continuing in force, but to set the first marriage itself aside from the beginning, and to make it no marriage at all. We are misled by calling it a consent to be satisfied with only a part of his affection; it is a consent to give him the power of making her happy or unhappy, just as his own interest or caprice shall direct him. If we put a liberty of polygamy, allowed by the woman to the man, into these terms, the effect, that it would have upon a contract of marriage by being joined to such contract, will appear more evidently. The man and woman in the contract of marriage have their mutual happiness in view, and this mutual happiness is the end, which determines them to enter into such a contract: each party therefore is understood to give the other, by the contract, a right in his or her person upon condition only, that each shall be bound to promote the happiness of the other: but the woman in the mean time consents, that the man shall be at liberty to follow his own humour, and to make her happy or unhappy, as that humour shall lead him. Such a condition as this is so plainly contrary to his part of the obligation in marriage, that it is impossible for the marriage and the condition to subsist together: if the marriage is valid, the condition must be void; if the condition is binding on her part, who grants it, the marriage must be a nullity.

I say farther, that the woman is bound in conscience to stipulate for the entire affection of her husband, and

that she puts it out of her power to do her duty, if she consents to be his wife upon any other terms. Her consent to be his wife certainly implies, that she consents to have children by him. And as the production of children is necessarily attended, on the part of the mother, as well as of the father, with the duty of providing for them, and educating them in the best manner, that she can ; she puts it out of her power to do her duty, if she agrees to have children upon any terms, which will put it out of her power to provide for them and educate them, so well as she might have done. But certainly she will not be able to provide for them and to educate them, so well as she might have done, if she consents to let him divide his affections between her and other women, and consequently between her children and theirs. Upon this principle, a liberty of polygamy, annexed to a marriage, must at first sight be wrong : and perhaps upon a closer inspection such a condition will be found to be void. The duty of the mother to provide for and educate her children may indeed be supposed to be of the imperfect sort ; and if it is, a simple transgression of such duty in any act would not be sufficient to make that act void. But in the case supposed the mother does more than simply transgress her duty ; she takes from herself the power of discharging it : and the law can never allow the validity of an act, by which the agent, if the act was valid, would be no longer obliged to obey the law.

Before we leave this subject, it may be worth our while to look back to their opinion, who contend, that polygamy on the part of the woman is unlawful upon this principle, that if she was to have more husbands than one, the issue would be uncertain, and the man might place his affection, or employ his care, or bestow his goods, upon children which are not his ; or might on the other hand be wanting in some of

those duties to his own children; as not having sufficient evidence, which children she had by him, and which by some other of her husbands. It is strange, that this should be thought a sufficient reason in the nature of the thing to bar the man against allowing the woman a liberty of having more husbands than himself; and yet that a like reason should not be sufficient to bar the woman against allowing a liberty of the same sort to the man. If it is matter of duty in him to secure all the benefits in his power to his own children; it must be as much matter of duty in her to secure all the benefits in her power to her own children; which, as we have already seen, she does not do, if she allows him, whilst she has a right in his person, to have children by another woman.

What is most apt to mislead us in this enquiry is, that only two persons are concerned in each separate contract of marriage; for which reason we conclude, that they may model the contract, as they please, without injuring any one: no other person is injured by any conditions, which they two agree upon; because no other person has any thing to do in the contract, or in any conditions, which relate solely to themselves: and neither of them can be injured by such conditions or reservations; because they are supposed to be made with the joint consent of them both. If then there is no injury done to any person by polygamy, it may be thought impossible to prove, that the law of nature forbids it. But in this way of reasoning in defence of polygamy there is a great mistake. In order to shew, that the law of nature forbids it, there is no occasion to shew, that any person is injured in the first instance by a liberty of practising it. Instead of attempting to shew the unlawfulness of it in this method, we compare such a liberty with

the notion of the marriage contract; and if we find, that polygamy and the marriage contract are inconsistent with one another; the conclusion is, that the nature of this contract so forbids polygamy, that the contract of marriage and a liberty of polygamy cannot subsist together. The consequence of which is, that though the woman endeavours by her consent to make the man's subsequent marriage lawful, it is not in her power: as the former contract between them two has taken from him the liberty of entering into a second marriage, so it has taken from her the power of giving him such a liberty. They must either agree to make their former marriage void: or otherwise this former marriage, if it continues in force, will make his subsequent marriage with any other woman a nullity. Whether they could by mutual consent dissolve their marriage is another question: but whether they could or not, polygamy would still be inconsistent with the marriage contract, and would, by the nature of that contract, be rendered impossible: for if they could dissolve it, then the second woman, that he takes, would be his only wife; and if they could not dissolve it, he could have no wife besides the first, as long as she lives.

I am aware it may be objected here, that allowing all, which has been urged, to be true, it would only prove the impossibility of polygamy, and not the unlawfulness of it. But we may observe in answer to this objection, that if it proves thus much, it proves enough for our purpose; it proves that the law of nature does not allow the same man to marry a second woman, whilst his first is living and continues to be his wife; and consequently, that his cohabitation with such second woman, under the pretence that she is his wife, must be unlawful. However it is to be remembered, that one of the arguments, by which we have shewn,

that it is not in the power of the wife, even by her own consent, to grant the husband a liberty of polygamy, was taken from the unlawfulness of such consent, from the inconsistency of it with the duty to her future children, which duty she undertakes by consenting to have children : for we shewed that her consent to a condition of this sort would therefore be void, because it has a continued viciousness adhering to it ; as it takes away her power, or sets aside her natural obligation, of providing for her children and educating them in the best manner that she can.

III. The authority of the law of Moses, the practice of the patriarchs, who lived before that law was given, and of the Israelites, who lived under it, are commonly urged in favour of the natural lawfulness of polygamy. It would however be necessary for them, who urge the authority of the law of Moses, in this question, to inform themselves, how far the precept, which they commonly produce as an evidence of its allowing polygamy, relates to this practice. The law says, — ' If a man have two wives, one beloved and the other hated ; and they have born him children, both the beloved and the hated ; and if the first-born son be hers, that was hated ; then it shall be, when he maketh his sons to inherit that which he hath, that he may not make the son of the beloved first-born, before the son of the hated, which is indeed the first-born : but he shall acknowledge the son of the hated for the first-born, by giving him a double portion of all that he hath. — As the law seems here to make a provision against an inconvenience, which might arise from the practice of polygamy, they, who favour the natural lawfulness of such practice, infer, that the Mosaic law must have allowed of it ; since no law can be supposed to guard against the consequences of any practice, if it did not

The case of polygamy under the Mosaic law, and before it.

allow the practice itself. But in this inference from the passage before us, they plainly take for granted, that the beloved and the hated wives must both of them be living at the same time: whereas neither the words nor the design of the law make such a supposition necessary. The inconvenience here guarded against might as easily happen, and might be as proper to be guarded against, if the wife, whom he hated, was dead, before he married the other, whom he loved; as if both of them were alive together. It may be said indeed, that such an interpretation of the passage inverts the order, in which the wives are mentioned: for the beloved wife is mentioned first in the precept; whereas the interpretation supposes her to have been the second. But this is a very weak objection: there is no reason for supposing, that the lawmaker, in mentioning the two wives, must necessarily observe the order, in which the man was married to them: nay the fact, as it is here stated, seems rather to imply, that he was first married to the hated wife; for the eldest son is supposed to be hers.

This interpretation will appear the more probable, if we compare this precept with another, that is to be found in the same law. — 'neither shalt thou take a wife to her sister to vex her, to uncover her nakedness besides the other in her life time. — This passage is rendered in the margin — Thou shalt not take one wife to another, &c — And the least acquaintance with the original language will inform us, that the words will very well admit of this marginal translation. Indeed, if we attend to the precept itself, we shall find, that the best rules of interpretation requires us to translate it in this manner. The reason of the law extends not only to the marriage of the first wife's sister, but to the marriage of any other woman, besides the first wife. The reason of the law is, that the first wife might not be

^s Levit. XVIII. 18.

made unhappy. And certainly she would be at least as likely to be made unhappy by his marriage with a woman, who was not at all related to her, as by his marriage with her own sister. If then the obligation of the law ought to be extended as far, as the reason of it extends, we must look upon this passage as a prohibition of polygamy. Another rule of interpretation is, that a law ought to be understood in such a sense, as will give some meaning to all the words of it. But if we suppose this precept to relate only to the marriage of two sisters, and the law elsewhere forbids such marriage universally, without considering whether the former sister is living or dead, the words — in her life time — will have no meaning or a very improper one. Unless they imply, that a man, after the death of his wife, might marry her sister, they will have no meaning : and if they imply this, their meaning will be an improper one ; because it will make this precept inconsistent with what is to be met with in other parts of the law. But if this precept relates to polygamy, the words have a clear meaning ; they were added to shew, that, though a man might not marry a second wife in the life-time of the first, yet the lawmaker did not design to forbid his marrying a second wife, after the first was dead. It must be owned indeed, that the law does not elsewhere expressly forbid the marrying of a wife's sister, supposing the wife to be dead ;^t but it forbids such marriage by necessary consequence. In the ^t Book of Leviticus the several degrees of consanguinity and affinity, which bar marriage, are enumerated ; and all of them are described on the part of the man ; that is, the law declares, that a man shall not marry a woman, if she stands in such or such a relation to him. But we may infer by necessary consequence, that whatever degree of consanguinity or affinity renders it unlawful for a man

^t Levit. XVIII. 6, 7, 8, &c.

to marry a woman, the same degree would in the intention of the law-maker render it unlawful for a woman to marry a man. Thus for instance, the law says — Thou shalt not uncover the nakedness of thy fathers or thy mothers sisters, that is, a man shall not marry his aunt — must not we conclude from hence, though the law has not expressly said it, that it was equally unlawful for a woman to marry her fathers or her mothers brother, that is, to marry her uncle? In like manner, when the law says, — Thou shalt not uncover the nakedness of thy brothers wife, that is, a man shall not marry his brothers wife; — the necessary consequence is, that it must be equally unlawful for a woman to marry her sisters husband: because whatever relation there is between a man and his brothers wife, there is just the same relation between a woman and her sisters husband.

If indeed we were to interpret the law of Moses by the practice of the Israelites, who lived under it, we might at first sight be inclined to think, that it had no where forbidden polygamy. But then, if on the other hand we consider, in how many instances their history informs us, that they neglected to observe their law, we shall find their practice to be far from a certain rule of forming any opinion about the meaning of the law, so as to judge from thence either what that law forbids or what it allows.

The example of the kings of Israel, in marrying many wives, and in taking many concubines is urged here, not so much to shew what was generally supposed to be the tenor of the law upon this head, as to carry us back to the law itself, which seems to tolerate them in this practice, when it only commands them not to^u multiply wives: for as multiplying wives implies taking a great number, a law, which only

^u Deuteron. XVII. 16. 17-18.

forbids too great a number, cannot reasonably be construed to bind them to have no more than one. But whoever attentively reads the passage here referred to, will find some grounds for believing, that, when the law forbids the king to multiply wives, we are not to understand by the word — multiplying — merely the encreasing of them to too great a number. If this was the true import of the word, what can the law mean, when it goes on to forbid him *greatly* to multiply silver and gold? If not multiplying silver and gold means not encreasing them to too great a quantity, the word *greatly* was here added without any meaning at all.

^wA truly learned prelate of our church has abundantly shewn, that the law, when it forbids the king to multiply horses, must be understood to forbid his keeping more horses, than was consistent with the spirit of their polity. And as they were taught, through their whole law, that their state was under the immediate protection of providence, it was inconsistent with a persuasion, that God would fight their battles, to carry into the field an army of horsemen, in which the strength of an armed force is supposed to consist. If we observe the same rule in interpreting this other command of not multiplying wives, the meaning of it is, that their king was not to have more wives than the law allowed of. So that instead of applying this passage to settle the meaning of the other parts of the law we must search the other parts of the law to ascertain the precise meaning of this. By following this interpretation we shall see why the law forbids the king *greatly* to multiply silver and gold. The spirit of their polity had determined, that an armed force of horsemen was not to be brought into the field, and the letter of their law had forbidden a man to take one wife to another. When therefore the legislator says, that the king shall

^w Sherlocks Dissertation IV.

not multiply horses or wives, the spirit of their polity in one instance, and the letter of their law in the other, had sufficiently determined, how far he might go, and where he must stop in these two particulars. But neither the spirit of their polity, nor the letter of their law had determined what quantity of riches a man might accumulate; something therefore was in this instance to be left to the prudence of the king; the boundary, how far he might go, and where he must stop, could not be precisely fixed; he was to take care only, that he did not go too far, and was commanded in general not *greatly* to multiply to himself silver and gold.

We are told farther, that, when Nathan was sent to David to expostulate with him in the name of God concerning his crime of adultery and murder, in the case of Uriah, Nathan amongst other blessings, which David enjoyed, mentions particularly, that God had given him his masters wives. Grotius takes notice of this as an argument in favour of the lawfulness of polygamy under the Mosaic dispensation: but as he does not explain himself, I cannot tell, whether he concludes this fact to make for his purpose from the gift of many wives being called a blessing, or from Nathan's saying, that God had given David these many wives. As to the number of his wives being called a blessing, it affords us no grounds for concluding, that the marrying many wives was agreeable to the strictness of the law: because when David was to be reproached with not being satisfied with what he already enjoyed, it was natural to call that a blessing, which he looked upon as part of his happiness, whether the enjoyment of it was tolerated by the law or not: nay there was more reason for reproaching him with it, if it was an indulgence to him, beyond what the law according to the rigour of it would allow; than if it had been a general permission, which the law had granted pro-

miscuously to every one. But if the strength of the argument rests upon its being said that God had given David those wives; it has but little to support it. Our author, if he had read three verses farther, would have found, that the enjoyment of what God is said to give is not therefore to be looked upon as lawful, because he is said to give it. God there threatens, that he would give Davids wives to his neighbour, who should lie with them in the face of the sun. This threatening was accomplished, when Absalom spread a tent upon the house top, and lay with his fathers wives there. But Grotius, I suppose would not conclude, that Absaloms act was lawful, from Nathan's having said, that God would give him his fathers wives.

The patriarchs, before the law of Moses was given, undoubtedly practised polygamy. But this is no evidence, that the law of nature allows of it; unless any one could first shew, either that the patriarchs were so much wiser, than their contemporaries, as to have traced out exactly all the precepts of the law of nature; or that God had been pleased by some express revelation to teach them this law in all its branches. Though we should allow, that they were ready to obey this law in all respects, as far as they knew it; yet unless their own reason, or some divine revelation had made them complete masters of all its precepts, their practice might in some instances not to be conformable to it. And I know not by what arguments it can be shewn, either that the patriarchs had by their own skill and application investigated the whole law of nature; or that God, when he was beginning to call mankind to obedience, laid open to them at once all the parts of this law.

IV. Before we leave this subject, it may not be improper to give the reader a short view of what the gospel determines upon it. Our Saviour, though he

Polygamy
forbidden
by the gos-
pel.

does not mention and condemn this practice in so many words, has sufficiently taught us, that it is unlawful. * He declares, that whosoever should put away his wife, unless for fornication, and should marry another, is guilty of adultery. But if a second marriage, after such divorce, has this character, we may be sure, that it would not fall short of the same character, where there had been no divorce: if it is unlawful to marry a second wife, after the first has been put away, it must be at least as unlawful so to marry before she has been put away. St. Pauls authority is express to this purpose; † he commands, that every man, who marries at all, should have his own or his peculiar wife; and that every woman in like manner should have her own or her peculiar husband. He has likewise assigned the natural reason, why neither the husband is at liberty to dispose of himself to a second wife, nor the wife at liberty to dispose of herself to a second husband, in the life time of the first partners of their bed: the reason is, that each has an exclusive right to the person of the other; the wife, says he, hath not power of her own body, but the husband, and likewise the husband hath not power over his own body, but the wife.

Divorce
forbidden
by the
law of na-
ture.

V. The second enquiry concerning the marriage contract is, whether the law of nature allows of divorce, or requires, that the contract should be perpetual so as naturally to continue during the joint lives of the parties.

It seems to be evident, at first sight, that this contract, like all others, cannot naturally be dissolved, at the discretion of one of the parties, without the consent of the other; whatever may be the effect, where both of them consent. As the obligation is produced by their joint consent, nothing less than a like joint consent can destroy that obligation: whatever right one

* Luke XVI. 18.

† 1 Cor. VII. 2, 4.

of the parties has in the person of the other, such right cannot justly be taken away without the consent of the party, whose right it is.

I choose to take particular notice of this, in order to correct their mistake, who imagine, that, ^z as divorce was permitted by the law of Moses, it cannot but be agreeable to the law of nature. Whereas whoever will be at the trouble of looking into that law, and of considering it with any degree of attention, will find this permission to be far from decisive: because he will find, that under the law of Moses divorce proceeded at the discretion and upon the authority of one of the parties. The husband, if his wife displeased him, wrote her a bill of divorcement and put her away. I should therefore think it impossible to prove from this permission in the law of Moses, that divorce is in itself agreeable to the law of nature: since the divorce, which the law of Moses permitted, is plainly contrary to the law of nature. I would not be understood to mean, that where such a liberty was allowed to the husband by sufficient authority, it would be unjust in him to make use of it: for certainly when the law had tolerated this practice, the woman, though she did not expressly consent to the divorce, at the time of putting her away, must be understood, as she knew what the law was, implicitly or tacitly to have consented to it, at the time of marrying. She was aware, that her husband had a legal power of putting her away, if she displeased him; and as she knew the conditions, upon which she made herself his wife, she could not but be supposed to agree to those conditions. By these means then, in consequence of the established and known toleration, the divorce would in this respect become natural; as it proceeded upon the declared intention of the husband, and upon the implied consent of the wife.

^z Deuter. XXIV. 4.

But what I contend for is, that this toleration itself was not natural, or that the law of nature could not grant it. And if divorce, as it was allowed of by the law of Moses, would, without such an authorized and exprefs toleration, have been inconsistent with the law of nature; I know not how any one can infer from the toleration of such a sort of divorce, that the law of nature allows of divorce. Either this conclusion, as drawn from the Mosaic law, must be given up; or else they, who defend it, must go as far as the Mosaic permission will lead them, and conclude not only, that a marriage may naturally be dissolved by the consent of both parties, but that naturally every woman takes her husband upon such conditions, that he alone by his sole authority may put her away, whenever he chuses it.

One would think indeed, that the authority of ^a Christ was sufficient to have determined, that no regard was to be had to this permission, in our enquiries, whether the law of nature allows of divorce or not; when he declares, that though Moses allowed the Israelites to put away their wives, yet from the beginning it was not so, and that this practice was tolerated for no other reason, but because they were too stubborn to be called back at once, from their long-received customs, to a full obedience to the will and design of their Creator.

When we examine this question, concerning divorce, by the law of nature, we must consider in the first place what sort of a contract the ends of marriage make necessary; whether they can be effectually obtained by a contract, which will expire of itself after a certain time, or may be dissolved by the act of the parties at any time; or whether they require, that it should be perpetual from the beginning, and incapable of being dissolved afterwards. For certainly where a

^a Mat. V. 32.

man and a woman consent to be husband and wife, that is, where they enter into a contract of marriage, the ends, which they must, from the nature of the contract, have in view, determine what sort of a contract it is, that they agree to. If those ends require it to be a perpetual and indissoluble one, their consenting to it for the attainment of those ends implies, whether they express so much or not, that they consent to be husband and wife for ever. Nay, if the ends of marriage require such a contract, though they should annex to it any express condition of being released, after a certain time, or of being at liberty to release themselves by joint consent at any time; yet such condition would be void. If they have a will to enter into a contract, which is in its own nature perpetual; they cannot at the same time with any effect will any condition, which should make that contract not perpetual. Such a contract and such a condition cannot possibly subsist together.

Now the ends of marriage are the mutual happiness of the parties, and the production of children. And we are to enquire what sort of a contract these two ends, which the parties contracting have in view, will make necessary. ^b Dionysius Halicarnassensis commends an institution of Romulus, by which one sort of marriage was rendered perpetual, and incapable of being dissolved: and upon this occasion he makes an observation, which will help to shew us, how much the happiness of the parties depends upon their entering into such a contract as this. "This law, says he, engaged the wives, who had no other resort, to yield a ready compliance to the temper of their husbands: and it obliged the husbands on the other hand to treat their wives as a necessary possession, which they could not on any account relinquish." Undoubtedly each party will be more ready to comply with the temper of the other,

^b L II. p. 95.

and to correct likewise what is amiss in their own, when they are under a necessity of continuing together for life, than if they had the refuge of a divorce, whenever they grew disagreeable to one another.

As to the other end of marriage, which is the production of children, it includes in it the duty of maintaining and educating them in the best manner, that the parties contracting are able: so that they, who engage in a contract of marriage with a view to this end, must naturally be understood to bind themselves to this duty; the care of educating the future children in the best manner, that they can, becomes by marriage the joint duty of the husband and wife. But this duty cannot be carried on by their joint care, unless there is an union of affections and interest: nor can there be such an union, when they know from the beginning, that at a certain time their mutual affections are to be withdrawn from each other, and their interests to be separated: and much less can there be any effectual union, when they are at liberty to withdraw their affections from each other, and to separate their interests, at any time.

Since then one of the ends of marriage, and the duty, in which the other end of it engages the parties, require that the contract should be perpetual; the consequence is, that where a man and a woman enter into the contract of marriage, they must, from the nature of the act, consent to make that contract perpetual: because it is absurd to suppose, that they have a will to contract for such purposes, as require their obligation to each other to be perpetual and unalterable, and yet that at the same time they have a will to make that obligation temporary or precarious.

It has I know been enquired, why this contract, as its obligation is derived from the will of the two parties concerned in it, should not, like other contracts, be capable

of being dissolved by the will of the same parties. I like a horse of yours, and as you are willing to sell him, we agree upon the price: and after we have so agreed, you take my money, and I take your horse. After a few days or weeks are past, we are both of us sorry for having made such a bargain; you are desirous of having your horse and I of having my money again. Whatever obligation we were under from the bargain, that had been made between us; if one of us proposes to set it aside, and the other agrees to this proposal, as there was no third party concerned in it, and consequently no one is injured by setting it aside, the effect of our so agreeing would be to make the bargain void. Nay suppose we had gone farther at first, and had agreed that the bargain should be perpetual, that the horse should be mine and the money be yours for ever, that neither of us would at any time make a proposal of setting the bargain aside, nor either of us accept such a proposal, if the other made it: the effect would still be the same; whenever one of us, though we had agreed to the contrary, should offer to set the bargain aside, and the other, though in opposition likewise to the first agreement, should close with the offer; there would be an end of the contract; and no injury would be done to any one. Why then should not the case of marriage be the same? A man and a woman agree to give each other a mutual right to one another's persons; they agree likewise to make this contract a perpetual one: but after they have lived with one another for some time, they find reason to repent of their bargain, and both of them wish to be released: as no third party is concerned in the contract, or injured by dissolving it; why should not their consent to release each other, as naturally and as effectually dissolve this contract, as it would contract of buying and selling? The short an-

answer to this difficulty is, that the law of nature, which requires one of these contracts to be perpetual, does not require the other to be so. For certainly, if the law of nature makes it necessary from the first, that, when two parties will marry, the contract of marriage, into which they enter, shall be perpetual; the same law will for ever continue to forbid them to dissolve that contract, after they are entered into it. There is an absurdity in saying, that a contract, which is perpetual in its own nature from the beginning, may lawfully be dissolved at any time by the consent of the parties, who are engaged in it. But a common bargain of buying and selling is not perpetual in its own nature; it is not only made, but modelled likewise, at the discretion of the parties; and as not only the obligation itself, but all the qualities of their contract are the effects of their joint consent, a like joint consent will change the qualities of it and dissolve its obligation. The objectors, when they suppose the buyer and the seller to have agreed, that the obligation of their contract shall be perpetual, put the case as strong as they can: but in the mean time, they do not attend to a material difference between a contract, that is perpetual in its own nature, whether the parties will or no, and a contract, that is made perpetual only by the act of the parties themselves. A man and a woman are at liberty, whether they will marry or not: but if they will marry, they are not at liberty, whether they will enter into a perpetual contract or not: if they will marry, they contract for such purposes, as force them to contract for life. You and I are not only at liberty, whether we will bargain for the horse or not; but we are at liberty likewise when we are determined to bargain for it, to model our bargain, as we please, and may either agree or not, that the bargain shall stand good for ever. Now since the former of these contracts is perpetual in itself, or

since this quality of being perpetual is necessarily connected with and inherent in the contract; it is not left to the discretion of the parties, after they have engaged in the contract, to change this quality, by any act of theirs, and so to make the contract temporary or precarious. A quality, which was not originally produced, is not liable to be destroyed again, by an act of their will. Whereas in the contract of buying and selling, the quality of being perpetual is derived wholly from the will of the parties; and because it is derived from thence, and not from the nature of the contract, it may be destroyed again, at their discretion, by the same cause, which at first produced it.

I have instanced in this contract of buying and selling, because others, who favour the contrary side of the question, have made choice of this instance to illustrate their opinion. But otherwise a contract of partnership, for trade or for any other purpose, has a much nearer resemblance to marriage. However the principle here laid down is equally applicable either to partnerships or to buying and selling. Though the partners should agree to trade together, they are neither obliged from the beginning by the nature of their contract, to make the partnership perpetual; nor are they so far bound to continue in partnership for their joint lives, as not to be able to release one another by joint consent; notwithstanding they bargained at first, that the contract should be perpetual. Because this perpetuity, considered as a quality of the contract, is not, like the perpetuity of the marriage-contract, derived from the contract itself, and in consequence necessarily connected with it: the perpetuity of partnerships, to which the partners agree, is the creature of their own wills, and as it was at first produced only by their joint consent, so it may naturally be destroyed again in the same manner by a like joint consent.

In what
manner
adultery
dissolves
marriage.

VI. But though the contract of marriage cannot naturally be dissolved by the mutual consent of the husband and wife, yet it happens in this as in all other contracts, that the contract will become void, if either party deprives the other of what such contract has given him or her a perfect right to: where the agreement is broken on one side, the obligation ceases on the other. Now by the contract of marriage each party has an exclusive right in the person of the other for the purposes of producing children. Adultery therefore, which deprives one of the parties of this right, or is a breach of the agreement on one side, releases the other party or makes the obligation void on the other side. It is necessary however to observe, that adultery does not so dissolve a marriage, as to release the adulterer from the bond of it, without the consent of the injured party. The contract of marriage is in this respect like other contracts: however one of the parties may be injured; yet if he knows of the injury, and is willing to submit to it, the contract will remain in force: if he chuses to continue under his former obligation, the party, who has done the injury, can by such injury acquire no claim to be released from hers.

It is upon this account, that the husband, if he receives the wife to his bed after adultery, cannot divorce her, till some fresh crime of the same sort has been committed. By this act he has shewn it to be his desire, that the marriage should continue: and as the contract, notwithstanding the adultery, was binding on her part, nothing was wanting, but such a declaration on his part, to re-establish it. It may therefore perhaps more properly be said, that adultery makes a marriage voidable, than that it makes them void: for if no act of the injured party follows the adultery, by which it appears that such party designs to be released from the marriage, if the husband, for instance, does not divorce

the adulterous wife, but continues to live with her upon the same terms, as before the adultery, the contract remains in force.

If wilful desertion is not allowed to have the same effect in dissolving a marriage, that adultery has ; the only reason for not allowing it must be the difficulty of fixing what is desertion, without some overt act of adultery. This however is certain, that nothing less than such a desertion as is properly wilful and obstinate can be deemed a sufficient cause for dissolving a marriage. The wife for instance may be forcibly driven away by her husband, or she may be compelled to leave him by bad usage, which is in effect a force upon her. And as desertion in cases of this sort is not her voluntary act ; it cannot justly take from her the right, which she had in his person. It is farther necessary, that the party, who deserts the other, should continue obstinate : because where the wife, who deserts her husband, is willing to return to him again ; his right in her person is not withholden from him, though the use of it may have been suspended for a time. And the difficulty of determining, without an overt act of adultery, what desertion is sufficient to dissolve a marriage, rests upon this point ; it cannot well be determined, what length of time, or what refusals of returning, are sufficient to shew make the desertion obstinate.

VII. It is a question, upon which people are much divided, whether ill usage on either side is naturally a sufficient reason for the party, which suffers, to claim a release from the bond of marriage, or to divorce him or herself from the person, who is the author of such usage.

Ill usage
does not
make
marriage
void.

Certainly the happiness of the parties is one of the principal ends, which each of them proposes in marriage. But this is so far from being a reason, why ill

usage after marriage should be sufficient to make the contract void, that it proves the direct contrary ; it proves that the marriage-contract must in its own nature be of such a sort, as is most likely to secure this end, and that it excludes all such conditions as are likely to prevent this end from being obtained. And if the nature of the contract requires this to be the intention of the parties, they cannot be supposed at the same time to design, that the contract should be void, if either party found themselves less happy after marriage, than they expected : because such a condition as this would plainly make the happiness of the married state precarious. Whoever wanted to get rid of a present wife, that he might be at liberty to marry another, would be sure to use the former ill, that he might by these means compel her to give him his liberty. Whereas if ill usage is likely to occasion no disturbance but in his own family, and he is upon that account under a necessity of feeling some of the effects of it, without being able to bring about any of his private purposes ; he will be much more likely to use his wife well, and to endeavour, as much as he can, to promote her happiness ; when he finds his own so closely connected with it. But if this is the nature of the contract, then whatever unhappiness either or both parties may meet with, after they have entered into it, they must look upon such unhappiness as a natural misfortune, and must either submit to it with patience, or endeavour on each side by good behaviour to soften the temper of one another, and lessen or remedy that evil, which they can remedy no otherwise, consistently with their contract.

But as the contract itself gives each party a right to the person of the other, for the purposes of producing children, so the condition, under which each of them makes over this right to the other, gives each of them likewise

a right to good usage from the other ; it may therefore be asked why a violation of the latter right by ill usage should not have the same effect upon the marriage-contract, that a violation of the former right by adultery would have upon it. In answer to this enquiry we must observe, that the law of marriage in one respect is—Thou shalt not commit adultery.—The law of it in the other respect is—Husbands love your wives ; and let the wife see that she reverence her husband.—The right arising out of the former law, is a perfect one ; because the precept is negative, and the matter of it for that reason is precise and determinate : whereas the right arising out of the latter is imperfect, as the precept is affirmative, and consequently the matter of it is more vague and uncertain. As there is no medium between committing adultery and not committing it ; no one can be at a loss to determine, when the right, which each party has to the person of the other, is violated. But good or bad usage admits of many degrees ; some of which are so slight, that it would be ridiculous to mention them as sufficient reasons for dissolving a marriage. And where there is so much latitude, it would be difficult, if not impossible, to settle the precise degree, which is sufficient for this purpose.

It would be an equitable and a natural temperament in this matter, to relieve the party aggrieved by allowing a separation, without dissolving the bond of marriage, as far as that bond hinders any second marriage. This is an equitable temperament, because where there is a real grievance, it would be a hardship to compel the party aggrieved to live miserably. And it is a natural temperament ; because it is most agreeable to the nature of marriage, that the bond should be perpetual, as for other reasons, so for this in particular, that a perpetual bond is, from the first, the most effectual means of securing to each party good usage from the other.

A second marriage is a nullity where a former subsists.

VIII. Having seen what will dissolve a marriage, after it is contracted, we are next to enquire what will make it a nullity from the beginning. One cause, which will make it so, has been already explained at large. ^c No second marriage can be valid, whilst a former marriage is subsisting. A man or woman, under the bond of a former marriage, have no power to dispose of their persons to any one else for the same purposes: because their persons are then not their own to dispose of; the right, which they had in them, was made over to the first partner of their bed. It is needless here to ask, whether a precontract in words of present time will invalidate a subsequent marriage of one of the parties concerned in it with any other person, besides him or her, with whom such precontract was made. The law of nature knows no distinction between a contract of marriage in words of present time and an actual marriage. The formalities, which distinguish such a contract from what is commonly known by the name of marriage, are of positive institution. If a man and a woman have agreed to live together in an union of affections and interests, and each of them has given the other a perpetual right in his or her person for the purposes of producing children; this is naturally a good and valid marriage: and as long as there is no divorce, upon account of adultery, such a contract is sufficient to set aside all subsequent marriages of either of them with any third person. A mutual promise of future marriage is not an actual making over a present right to each others person; it is only an agreement, that they will make over such a right hereafter. This too may be called a contract, but then it is only of the promisory sort: and any subsequent marriage of either of the parties, engaged in such a promise, to a third person would be valid, notwithstanding the prior promise.

^c Grot. Lib. II. Cap. V § XI.

For each party has still a right in his or her own person; and this will be sufficient to make the subsequent disposal of it binding. The promise however is not without its effect; for, as in the case of buying and selling, it entitles the party, to whom it was made, to all such damages, as may be suffered by the breach of it.

We said indeed, in speaking of promises, that a promise gives a right over the person of the promiser: and since an actual marriage conveys no more than a right to the person of him or her, who engages in it; we may be asked what difference there is between a marriage in words of present time, and a promise of marriage in words of future time. What hinders us from immediately seeing the difference is, that in marriage-contracts the person and the thing are confounded: if instead of saying that a contract in words of present time gives each party a right to the person, we say, that it gives each party a right to the body of the other for the purposes of marriage; we shall more clearly see the difference between such a contract and a promissory one. A contract in words of present time gives each party a right to the body of the other: whereas a promissory one gives each a right only over the liberty of the other, as to the future disposal of their bodies.

IX. The contract of marriage is so far complete as to be binding upon the parties, when each has consented to give the other a present right to their bodies respectively for the purposes of marriage. Consummation is no more than taking actual possession of what by the previous contract each had a right to.

Want of consummation, in what it voids a marriage.

We are however to observe, that this contract, like all others, is binding conditionally: so that a failure of performance on one part releases the obligation on the

other part. Impotency therefore on the part of the man, or incapacity on the part of the woman, will set the contract aside. The man and the woman have in words made over a right to their persons respectively for the purposes of marriage : but making over this right is in effect making over nothing, where one is impotent or the other incapable.

This seems to be what has led some to imagine that a marriage is incomplete, till after consummation. As an impossibility of consummation will set the marriage aside, they conclude it not to be complete by the mere contract. But we have shewn already, that it is so far complete, as to be binding upon the parties ; and that properly the want of consummation, arising from impotency or incapacity, rather invalidates by non-performance a marriage, that was otherwise complete, than makes it a nullity from the beginning by any defect in the marriage itself.

However, though the law of nature gives each party a perpetual right to the person of the other ; it does, not determine how long the use of that right must necessarily continue : and upon this account the imperfections, which are sufficient to set a marriage aside, must be from the first : whatever imperfections arise afterwards will not produce this effect.

Marriages
between
relations
now made
invalid.

X. ^d Marriages between persons, who are nearly related to one another, either by consanguinity or affinity, are generally held to be null from the beginning. We call those relations by consanguinity, who are relations by birth ; such as parents and children, brothers and sisters, uncles and nieces. Relations by affinity are relations in consequence of some former marriage ; such are fathers or mothers in law and their children in law, a man and his brother's wife, or a woman and her sisters husband.

^c Grot. *ibid* § XII.

In our enquiries upon this head, it will be necessary to distinguish between kindred in the direct line, as parents and their children, and kindred in the collateral line, as brothers and sisters, uncles and their nieces, or aunts and their nephews.

There is a plain reason in nature, why marriages, between persons related by consanguinity in the direct line, should be void from the beginning. The difference of age, which some have assigned as the reason, is not satisfactory: because where the parties are not related one to another, though the difference of age between them should be the same, as is usual between parents and their children, or even between grand-parents and their grand-children, such marriage is not looked upon as a nullity. But all acts are void, if the validity of them would set aside the obligation of a law of nature; it being impossible to suppose, that the law of nature can allow what would destroy its own authority. Now a marriage, between a mother and her son, or a father and his daughter, is not merely contrary to that natural duty of honour, which children owe to their parents, but would, if it was valid, supersede the duty and set it aside: such a marriage would make the children equal to their parents; and the necessary familiarities, which marriage supposes, are wholly inconsistent with that reverence, which is implied in the notion of a child's honouring its parents.

It will be more difficult to find a natural reason, why persons, who are related to one another by affinity, or by consanguinity in the collateral line, should be under an incapacity of contracting a valid marriage. If we have been brought up from our infancy in an opinion, that it is unnatural for a brother to marry his sister, we shall be surprized to hear it asserted, that no reason in the nature of the thing itself can be found,

which will render such a marriage unlawful; and much less can any be found, which will make it void. Our surprize however, at hearing this asserted, will probably be abated; if we recollect the history of the Creation; from whence we may learn, that the sons of Adam could have no wives but their own sisters. And we cannot imagine, that God would have contrived to place mankind in such circumstances, as must either have put an end to the human species at once, or else have laid them under the necessity of doing what the law of nature forbids.

Some moralists indeed tell us of a natural abhorrence of such mixtures as these: they say, that every man's own inward sense or instinctive feelings is in this instance a law to him, and informs him what he may and what he may not do. One would be apt to question whether there is such an abhorrence implanted in us by nature; when we find nothing, which can be called by this name, except in countries where people are bred up in an opinion, that these marriages are unlawful: in other countries where the law or custom allows of them, there seem to be no traces of any such abhorrence. In fact, if this instinct was the only cause, why a man might not marry his sister, I do not see how such a marriage could in any particular instance ever be shewn to be unlawful. Whatever other men may feel; it may fairly be presumed, that the man, who actually marries his sister, is not sensible of any such abhorrence. And however unlawful marriages of this sort may be supposed, where the parties have this instinct; I see not how such an instinct, where it is not felt, can make them unlawful. Unless the sense or feeling, the desires or aversions of one man, are the proper standards, by which to regulate the conduct of another.

It is farther urged against marriages between two persons, who are nearly related to one another ; that a man enlarges his interest by marrying out of his own family : he is already connected with his own kindred ; and if he marry with them, it will be of less benefit to him, than if he had taken care to create new connections by marrying into another family. This however can be only matter of prudence. The most we could prove from this consideration is, that such a marriage will sometimes be less beneficial, than another might have been. But it does not by any means follow from hence, that the marriage is unlawful. All acts, which are contrary to a man's immediate interest, are not for this reason to be always looked upon as criminal.

But though we may be at a loss to find out a natural reason, which renders the marriages of persons related in the collateral line unlawful ; yet it seems to be very certain, that such marriages are unlawful to all mankind. ^e These incestuous marriages are particularly mentioned as a part of the guilt of the Canaanites, and as one reason, amongst others, why God was pleased to cast them out of their land, and to give it to the children of Israel. There is not the least reason for imagining, that God had ever given any positive law about this, or any other matter, to the Canaanites in particular, exclusive of the rest of mankind. But if he had not done this, and yet the Canaanites were obliged to observe such a law, and were represented as sinners for not observing it ; the plain consequence is, that this law must have been universal, so as to have obliged all mankind. But because it was an universal law before the coming of Christ, and yet was no part of the law of nature ; it must have been a positive law given either to Adam or to Noah. Now from the necessity,

^e Lev. XVIII. 24. 25. 27.

that Adam's children were under to marry with one another, we cannot well imagine any such law to have been given to him by the same God, who had laid them under this necessity, by making no provision for them to marry with any one else. We must therefore conclude, that some positive law forbidding incestuous marriages was given to Noah, and in him to all his descendents.

This observation may help to explain a difficulty in the apostolical decree upon the question, whether the converted gentiles ought to be circumcised. The apostles determined, that those gentiles were free from the yoke of circumcision, but required them to abstain from fornication, from things offered to idols, from things strangled, and from blood. As three of these articles forbid things, which are in themselves indifferent; the difficulty is, why the other is article should forbid fornication, which the law of nature had already made criminal. One would expect, that decree should be uniform, as to the matter of it; especially since we see no occasion for the apostles to interpose their positive authority to provide against a practice, which was naturally and in itself unlawful.

¹ Mr. Hooker here refers us to what are called the seven precepts of the sons of Noah, one of which is — “To abhor all unclean knowledge in the flesh. — This precept he understands to relate to unlawful marriages, such as Moses in the law reckons up; and declares, that for his own part he thinks the apostolical canon is rather to be understood of these, than of fornication, according unto the sense of the law of nature. Words, says he, must be taken according to the matter whereof they are uttered. The apostles command to abstain from blood. Construe this according to the law of nature, and it will seem, that homicide only is forbidden; but construe it in reference to the law of the

¹ B. IV. § II.

Jews, about which the question was, and it will easily appear to have a clear other sense, and in any man's judgment a truer, when we expound it of eating, and not of shedding blood. So if we speak of fornication he that knoweth no law, but only the law of nature, must needs make thereof a narrower construction, than he, which measureth the same by a law, wherein sundry kinds even of conjugal copulation are prohibited as impure, unclean, dishonest. And ^s St. Paul himself doth term incestuous marriage fornication."

However it is to be presumed, that this positive law, forbidding incestuous marriages, had some general convenience attending it. Though such marriages do not appear to do any injury to any one, and consequently are not naturally unjust; though they do not disqualify a man for doing good, or hinder him from doing it, any more than any other marriage; yet it is to be presumed, that some benefit must arise from avoiding them, if not to the public, yet to the individuals, who do avoid them, for we can scarce imagine, that what is of no use at all, in any view of it would ever be established by a divine command. The reason of this law is commonly supposed to be, that near relations live together in such a free and unobserved manner, as would tempt them to be guilty of much unchaste practice, if they were not kept, as it were, at a distance and checked in their desires by a law, which forbids them to marry with one another. But it seems to be evident, that the Mosaic law had some other reason in view: for it prohibits a man from marrying his sister, ⁱ whether she was born at home or abroad. Her being born at home implies, that there were opportunities of free intercourse between her and her brother: but her being born abroad implies on the other hand, that there might have been no such oppor-

^s 1 Cor. V. 1.

ⁱ Levit. XVIII. 9.

tunities. So that the law in effect says — Thou shalt not marry thy sister, whether there has or has not been any opportunities of familiar intercourse; whether thou hast or hast not lived with her in a free and unobserved manner.—It appears to me to be much more probable, that the legislator intended, by this provision, to leave mankind as free as possible to chuse for themselves in marriage. A father or mother might consult some particular conveniences of the family, rather than the inclination of their children; and whatever interest or caprice determined them to bring about a marriage between two of their children, they would easily be able to accomplish such marriage, if the brother and sister could make a valid marriage: because both the parties are under their authority and direction, and might not only be unduly influenced by such authority, when they were arrived at maturity, but might, even during their minority, be contracted to one another by the acts of their parents. Indeed where the parties are children of different parents, their respective parents may possibly be determined, by some interest or caprice of their own, to influence such children to engage in a marriage disagreeable to themselves. But when the parents are of different families, the parties are not under the authority of the same common power; they are each of them under the authority of their own parents only. And as these parents have no other common interest, but what arises from the proposed marriage; they will be much more likely each of them to consult the inclination and interest of their respective children, than to join in using their authority to drive their children into a marriage, which, as it was disagreeable to them from the first, was likely to end in nothing but misery.

XI. Unjust force, if either of the parties are concerned in making use of it, will be sufficient to prevent the obligation of marriage; in the same manner as it prevents the obligation of other contracts: because, as in them so in this, injustice can be no foundation of a right in the person, who is guilty of it, and can therefore produce no correspondent obligation upon the person, who suffers it. Indeed if voluntary consummation follows such an extorted marriage, the marriage is then binding: because this is a plain indication, that the person, who suffered the unjust force, is willing to abide by the contract. Consummation by force in consequence of such an extorted contract is a rape.

Force may make a marriage a nullity.

XII. We have seen that some errors will be sufficient to invalidate promises or contracts: and what has been said concerning other pacts is applicable to marriage, under such restrictions as the nature of this contract requires.

The effects of an error on the contract of marriage.

If a man stipulates for one woman, and another is imposed upon him, instead of her that he agreed with; such a marriage is voidable at the mans discretion: because in fact he never consented to marry the woman thus imposed upon him. However, if he acquiesces in the fraud, after it is known, as Jacob did in the case of Leah; by such acquiescence the marriage becomes valid.

Most of the other errors, concerning which any question has arisen, whether they prevent the obligation of a marriage and make it a nullity, will be found upon enquiry to imply such conditions, as are inconsistent with the nature of the contract, and cannot therefore either be supposed to be contained in the contract, if they are not expressed, or to produce any effect at all, if they are. Such are the questions, how far an error, in regard to the womans fortune, or in regard to her virginity, will make a marriage void. A man may indeed stipulate in this form — I consent to marry you,

provided you have such or such a fortune. But then the contract must stop here, till he has informed himself, whether she is worth what he requires or not. He gives her no right to his person, and consequently has no right to her's, till this condition is satisfied. But if, without enquiring any farther, he proceeds to act, as if he had a right to her person; as he does, if he proceeds to consummation; he tacitly owns, that she has a right to his: and consequently by so doing he must be understood to relinquish the condition. The marriage therefore will continue in force, notwithstanding he should afterwards find, that she is worth less than he stipulated for. If he could have any claim at all, in virtue of the condition, which he originally annexed to their contract, it must be a claim to be released from it by divorce. But the law of nature will not support such a claim. For the condition was not, that if you have not such or such a fortune, I will divorce you after marriage; but, if you have such or such a fortune I consent to marry you, and not otherwise. The terms therefore of this condition, however they might justify him in not marrying her, would not justify him in divorcing her afterwards. And if he was to annex the former of these conditions to his contract with her; either such condition would be made void by the nature of the contract; or if the condition was valid, it would make the contract a nullity; as has been shewn already, when we were speaking of divorce.

An error concerning the womans virginity, or concerning any natural infirmities, which modesty or decency will not allow a man to inform himself about, till the contract is completed, and each has taken possession of the others person, cannot hinder that contract from binding, or make it a nullity from the

beginning. A man may stipulate in this form — I consent to marry you, provided you are a virgin. — But this condition must be expressed: for the marriage contract does not naturally imply any such condition. And if it is expressed, I do not see, that it would hinder the natural effect of the contract, though the man should afterwards discover, that she is no virgin: because he must not only complete the contract, but must give her possession of his person by taking possession of her's, before he can make the discovery: and by so doing he gives up his conditions, and binds himself absolutely. The form of the stipulation did indeed make the marriage conditional; so that, as long as such condition remained in force, she could not demand him as her husband. But before he knew, whether the condition would be satisfied or not, he made himself her husband, and consequently gave up the condition, by taking possession of her person. It may however be asked, whether such an error as this, though it does not make the marriage a nullity, may not be a sufficient cause for a divorce; whether the contract, though it is not void in itself, may not upon this account be rescinded afterwards. In answer to this enquiry, we may say the same, that we said in answer to the other enquiry, whether an error concerning the womans fortune is a sufficient cause for rescinding a marriage. It will be a sufficient cause, provided divorce in general is lawful, but not otherwise. When other contracts are rescinded upon account of any error in them; this rescinding of them is not the setting aside a valid contract, but is the effect of a declaration of one of the parties, that he will not abide by a contract, which from the beginning laid him under no obligation. But we have seen, that in the marriage contract consummation precludes a man from declaring this, notwith-

standing any error either in the fortune or in the virginity of the woman. And consequently a marriage, where there is such an error, can be rescinded no otherwise, than by setting aside a valid contract. So that, if divorce is unlawful in general, marriages after consummation cannot be dissolved, upon account of these or the like errors on either side. The Mosaic law indeed allowed an error in the womans virginity to be a sufficient cause for dissolving a marriage: but this allowance is consistent with the principles here laid down; since we know that the same law allowed of divorce in general.

Want of
parents
consent
not always
sufficient
to make a
marriage
void.

XIII. ^k The full use of reason is necessary in marriages, as in other contracts, to make them binding. So that a marriage contracted between persons, who are under age, and have not yet arrived at the use of reason, will be void for want of the consent of parents. Or if only one of the parties are upon this account incapable of binding themselves; the marriage will produce no obligation upon the other; because there is no obligation at all in any contract, unless such obligation is mutual. We may here observe by the way, that the want of reason is naturally sufficient to make the marriage of an idiot or lunatic a nullity from the beginning.

Where persons are of full age, the want of their parents consent does not invalidate a marriage. The law of nature does indeed enjoin, that children should honour and reverence their parents. For which reason it is undoubtedly the duty of children, not only to advise with their parents, but likewise to let their advice have its due weight, in all affairs of moment. And since nothing can be of more moment to the advantage and welfare as well of the family in general, as of the child in particular, than the marriage of the child; it cannot be denied, that such marriages, as are contracted without the consent or against the com-

^k Gret. ut. sup. § X

mands of a parent, are contrary to the duty of the child; and that consequently the parent cannot be blamed, if he takes less notice of such a child, than he takes of the rest of his children, and chuses to dispose of his favours amongst those, who have been more observant of their duty towards him. But then on the other hand marriages so contracted are not invalid, provided the child is of a proper age to think and to act for itself. At this age he has a power of binding himself, and is not under the authority of his parents; except in such things, as relate to the interests and order of that family, of which he is a member, and of which the parents are the governors. And even this authority ceases, as soon as he separates himself from the family of his parents. The interests of the family are indeed greatly concerned in the marriage of the children: but then the child is by marriage separated from the family; and thus an end is put to such authority of the parents, as arose from this consideration.

XIV. It does not appear from any thing, which is contained in the contract of marriage, that the husband has any other authority over the wife, than what arises from the general presumption, that he has more skill and experience than she has: which is a consideration, that will make it prudent in her to leave the chief direction of the family to him. And this is no more than what he might expect from her; as she is obliged to contrive for their mutual happiness, as well as she can: which she does not do unless she willingly commits the management of such affairs to him, as he is likely to manage to greater advantage than she could.

Husbands
authority
whence it
arises.

But yet, when it happens otherwise; when her skill is the greater of the two; it will be equally prudent in him to let her have the management. The scriptures

have indeed taught us, that the wife is in subjection to her husband ; and have given such an account of her duty, as makes it proper for her to promise obedience in the very contract of marriage. But then they teach us at the same time, that such subjection is not her natural state, but was appointed by positive institution, as a punishment for that crime, into which the first husband was seduced by the first wife ; that it might be a standing lesson of humility to all future wives, reminding them, that through the weakness of their sex a curse has been entailed upon the whole species.

What concubinage is a good and valid marriage.

XV. ^k A concubine, according to the sense, in which the word is now commonly used, is a woman, who cohabits with a man without any stipulations of conjugal faith. And when by concubinage we mean such a cohabitation as this, it differs little, as to the unlawfulness of it, from a vague lust.

But the scriptures use the word concubine in such a sense, that those women who are there called by this name, are such as the law of nature allows to be wives : for as far as it appears, they were joined to the man, with whom they cohabited, by a marriage contract, and were no otherwise distinguished from wives, than either by their own condition or by the condition of their children. If the woman was originally of servile condition, and was not raised by the marriage to an equal condition with her husband ; and if the children, which she should bear, were understood to have no claim to inherit ; she was then called a concubine. Thus Hagar, who was of servile condition, was Abrahams concubine. She was originally a slave ; and we find by the authority, which Sarah had over her, that her cohabitation with Abraham had not made her of equal dignity with her mistress. Her son Ishmael was

^k Grot. *ibid.* XV.

indeed designed by Abraham for his heir : but then his claim was founded upon his being adopted by Sarah, and was not derived from the marriage of his mother. In like manner Bilhah and Zilpah were of servile condition : and their marriage with Jacob did not change their condition : for they are called handmaids even after their marriage : nor did the children, that were born of them inherit any otherwise than in virtue of their being adopted by Rachel and Leah : for Bilhahs children were considered by Rachel as her own ; and so were Zilpahs children considered by Leah. After marriage they were indeed sometimes called wives ; but it is plain they were not wives of the same sort with Leah and Rachel, not only because they were still sometimes called handmaids, and because their children were not considered as their own, nor inherited in their right ; but likewise because Jacob had obliged himself by oath to Laban not to take any wife besides his daughters. Bilhah therefore and Zilpah, though they are called wives, seem to have been concubines. And from this instance, as well as from that of Keturah, who is sometimes called Abrahams wife, and sometimes his concubine, it appears how little a wife differed from a concubine. As to the essential parts of the contract, they seem indeed not to have differed at all. Only in the contract with a concubine some disadvantageous conditions were added, in respect both of herself and of her children. But as these conditions were not inconsistent with the contract, the law of nature would not have disallowed of such concubinage, as we read of in the scriptures, if it had not been attended with polygamy.

C H A P. XVI.

Of the right of Defence.

I. Right of defence in what founded. II. Indefinite in its extent. III. Not confined to injuries. IV. How affected by benevolence. V. Defence of life. VI. Defence of limbs or chastity. VII. Defence against slighter personal injuries. VIII. Honour what. IX. Mistakes in matters of honour, whence they arise. X. Defence of our goods.

Right of
defence in
what
founded.

I. **A**MONGST the other principles, from whence any one man may derive a right over the person of any other, I mentioned some crime or injury on his part, over whose person such right is acquired.

^m Now the rights which are derived from hence, may be divided into such, as arise from an injury before it is committed, and such as arise from it, after it is committed.

Those rights, which arise from an injury, before it is committed, are called the rights of defence.

The injuries, which any one designs to do us, are such as relate either to our person or to our property. Of the former sort are murder, rape, maiming, wounding, slander; of the latter sort are theft, fraud, robbery, burning or otherwise destroying or wasting our goods. And our natural right of defence is nothing more than the liberty, which the law of nature allows us, of taking such measures, as may guard against any injuries, which we are likely to suffer in our persons or property. The great question concerning this right of defence is how

far it extends; what liberty the law of nature allows, or what may lawfully be done in order to prevent an injury which any one designs to do us.

" Before we can determine any thing with certainty upon this question, it will be necessary to enquire into the true principle, upon which the right of defence depends. A right to our life, or to our goods, means no more than a liberty of preserving them or keeping possession of them: we are therefore said to have a right to any thing, because the law of nature does not oblige us to part with it; or because our possession of it, and our endeavours to keep such possession, are consistent with that law. Now our endeavour to keep possession of a thing, when any one attempts to take it from us, is the defence of ourselves in the possession of it: and since, where the thing is our own, or where we have a right to it, this endeavour is consistent with the law of nature; it follows, that where we have a right to a thing, our defence of ourselves in the possession of it is lawful; or that a right of defence is implied in the very notion of our having a right to a thing. In short, the true principles, upon which our right of defending either our persons or our goods depends, is this; the law of nature does not oblige us to give them up, when any one has a mind to hurt them or to take them from us: and that the law of nature does not oblige us thus to give them up, is evident; because our right to them would be unintelligible, or would in effect be no right at all, if we were obliged to suffer all mankind to treat them, as they pleased, without endeavouring to prevent it.

II. If this then is the principle, upon which the right of defence depends; we cannot expect to find, that the law of nature has exactly defined how far we may go, or what we may lawfully do, in endeavouring to pre-

Right of
defence
not confined to injuries.

ⁿ Grot. *ibid.* § III.

vent an injury, which any one designs and attempts to do us. ° The law allows us to defend our persons or our property: and such a general allowance implies, that no particular means of defence are prescribed to us. We may however be sure, that whatever means are necessary must be lawful: because it would be absurd to suppose, that the law of nature allows of defence, and yet forbids us at the same time to do what is necessary for this purpose.

From hence it follows, that he, who attempts to injure us, gives us an indefinite right over his person, or a right to make use of such means to prevent the injury, as our behaviour and his situation make necessary.

Right of
defence
indefinite
in its ex-
tent.

III. ° Though we speak of the right of defence, as a right to guard against injuries; the word injuries must not here be confined to its strict and proper sense, as implying some criminal malice in the person, against whom we have a right of defending ourselves. The principle, upon which this right is founded, will extend it to all cases, where we are likely to suffer any causeless harm; even though there is no criminal design on the part of the assailant or of him, who unless we were to prevent it, would be the immediate, though perhaps the innocent, cause of our suffering such harm. For the law of nature no more obliges us to undergo any causeless harm, when it arises from an innocent person, than when it arises from a malicious design: our right of defence is not founded in the crime of him, who attempts to hurt us; but in the liberty, which the law allows us, by not obliging us to submit to any harm, which we have not deserved.

How be-
nevolence
affects the
right of
defence.

IV. Before we go on to apply these general principles to particular instances, it may not be improper to enquire, whether the right or liberty of defence is not

° Grot. *ibid.* § X.

p Grot. *ibid.* § III.

restrained by the dictates of benevolence, notwithstanding there is no precept of strict justice, which takes it from us.

If indeed the law of nature had commanded defence, the least degree of patience or submission to any causeless harm would be criminal. But since the defence of our person or of our property is just, only because it is not unjust; since we are only allowed and not commanded to defend ourselves, or to guard against injuries; defence seems to be a matter of indifference. Will not therefore the regard, which we ought to have for the welfare of others, be a check upon us, and engage us to submit to an injury; as there is no want of injustice in submission; rather than suffer us to make use of the right, which we have over the person of him who attempts to hurt us; as the exercise of this right may argue a want of benevolence or compassion, a want of that tender regard, which is due to his welfare? This reasoning will certainly prove to demonstration, that there is great room for benevolence in the exercise of our right of defence; and that proper abatements in the rigour of it, by patience and submission, are by no means inconsistent with any precepts of justice. But in the mean time; though benevolence may lead us to regulate our right of defence, and to make it as consistent as we can with the welfare of others; we have no reason to imagine that the same virtue of benevolence will oblige us wholly to give up that right, or to be satisfied with the use of such means of defending ourselves, as would render it wholly ineffectual. The highest degree of benevolence seems to be that of loving others as well as ourselves; of being as tender of their welfare as we are of our own; or of paying an equal regard to an equal degree of happiness, whether it is our own happiness, or the happiness of another

man. But even this degree, of benevolence cannot require us quietly to give up either our life, or our liberty, or our limbs, or our goods, without endeavouring to preserve them ; merely from the apprehension, that he, who attempts to deprive us of them, might suffer some hurt, if we were to defend them. By so doing we should do more than the law of benevolence imports ; we should pay a greater regard to his happiness, than to our own ; whereas the law only requires us to pay the same. As there is therefore no want of justice in standing upon our defence, so neither is there in the first instance any wants of benevolence. The consequences of our doing this may indeed be fatal to him, who attempts to injure us : but then these consequences are chargeable upon himself, and not upon us. We only desire to secure what is our own : he sees what may be the event, if he obstinately persists in endeavouring to take it from us : and if notwithstanding this, he is obstinate enough to persist, the consequences must be considered as arising from his own act rather than from ours.

Defence of life. V. These general principles will perhaps be better understood, if we apply them to some particular instances.

^a If a man is attacked with a plain design to kill him ; as the law of nature does not oblige him to part with his life, he is at liberty to stand upon his defence, and has a right, against the aggressor, to do whatever is necessary for preserving himself from the hurt intended him. If the aggressor suffers any harm, if he is wounded, or maimed, or killed, this cannot be looked upon as unjust or causeless harm : because he, who did it, was providing for his own security ; he was doing what the law of nature allowed him to do, and killed the aggressor, because he could not avoid it. The end therefore was lawful in itself, and the means were made lawful

^a Grot. *ibid.* § III.

by being unavoidable. You may say indeed, that the means were not unavoidable, provided he would have consented to part with his own life. But this is nothing to the purpose: for whatever is absolutely necessary for obtaining an end, which the law will justify him in pursuing, must in the judgment of that law be unavoidable. It might perhaps be possible for a person, who is thus assaulted, to save his life by running away from the danger. The assailant however has no right to demand, that he should do this. As the law of nature allows the person assaulted to secure himself; it leaves him at liberty to judge what means are necessary for this purpose; whether for instance he can preserve himself by running away, or must necessarily stand upon his defence. Benevolence may persuade him to chuse that method of providing for his own safety, which will be attended with the least hurt to the aggressor. But where the danger is instantaneous, the mind is too much disturbed to deliberate upon this head; and if it was more calm, there is no time for deliberation. I see not therefore any want of benevolence, which can be reasonably charged upon a man in these circumstances; if he takes the most obvious way of preserving himself: though perhaps some other method might have been found out, which would have preserved him as effectually, and have produced less hurt to the aggressor, if he had been calm enough, and had been allowed time enough to deliberate about it.

† The danger, which our life is in, may be less immediate; a person may have threatened to kill us, whenever he meets with a fair opportunity; he may have taken some steps toward putting this design in execution; he may have hired assassins, or may have laid in wait for us himself. In such remote dangers, there is more leisure for deliberation, and the sugges-

† Grot. *ibid.* § V.

tions of benevolence may be better attended to. But even in these circumstances defence is lawful. If they, who live out of civil society, should kill a man, in their endeavours to get security of him against their suffering the evil, which they foresee to be otherwise unavoidable, there would be no injustice in such defence: and the circumstances might be such, as would clear the fact from the charge of inhumanity. If the person, against whom there is this design, is morally certain of it; he has a right to demand security: the public authority would interpose and take care, that he should have security, if he lived in a state of civil society: and if there is no magistrate, no public authority, the law of nature will allow him to do, what in a state of civil society the magistrate would have done for him; it will allow him to get security for himself, and to make use of force in order to obtain it; when it cannot be obtained by any other means. This law cannot be supposed to oblige a man to expose his life to such dangers, as may be guarded against, and to wait, till the danger is just coming upon him, before it allows him to secure himself. Whatever degree of assurance he has, that he shall lose his life, if he does not take care to guard it; he may reasonably demand the same degree of assurance, that the design against him is laid aside, and will never be put in execution. His right is only to demand such security, as is necessary for this purpose: and if they, whom he had reason to be afraid of, will give him it, he can ask no more. But if they refuse this, his right still subsists; and consequently he may lawfully make use of force to compel them: because the right, which he has to be secured against their ill designs, would in effect be no right at all, if he might not support it by all necessary means. If then they should make resistance to such force, and in making resistance should be killed, it is their fault, and not

his: they lose their lives not through any want of benevolence in him, but through their own injustice. He would have been satisfied with sufficient security, that he should not be hurt by them: and if they oppose this demand, and are killed in the struggle; there is no breach of justice on his part: because he was supporting a just demand by the means, which they had made necessary: and there is no breach of benevolence; because no rule of benevolence requires him to set a greater value upon their life, than upon his own; as he certainly must have done, if he had exposed himself to their designs, rather than endeavoured to obtain such security for himself, as he has a right to.

* It is possible, that a man may make an attempt upon my life, and yet be innocent in so doing; notwithstanding I have not deserved death from him or from any one else. He may walk in his sleep; or he may be out of his senses; or he may mistake me for some one else; or he may be employed to fight against me in what appears to him to be a just cause, though it is not so. In such cases as these, though he is not chargeable with any crime, I may lawfully defend myself against him, and may make use of all such means of defence, as the circumstances, that we are in, have made necessary. For though we consider the right of defence as arising from a crime, not yet committed, but designed and attempted; yet the principle, upon which we shew, that there is such a right, extends farther than those cases, where the assailant is properly speaking guilty of a crime. The right which I have against the assailants person, is the liberty, which the law of nature must necessarily be understood to allow me, by not obliging me to bear any causeless harm; whether there is any crime or not on the part of him, who attempts to do me such causeless harm.

* Grot. *ibid.* § III.

But suppose a person, without any design of hurting me, should happen, when I am assaulted by another, to stand in my way, and hinder me either from making my defence or from providing for my security by flight; might I ride over him, or push him down a precipice, or otherwise dispatch him, in order either to clear the way for my flight, or to remove the hindrance, which he is of to my defence? Certainly this would be unlawful, if nothing but injustice, as injustice, could give me a right to take away the life of another man for the preservation of my own. But if my right of defence, which I have even in cases of injuries, arises from the liberty, which the law of nature allows by not obliging me to submit to any causeless harm; this principle will extend the right of defence to all cases, where I am likely to suffer any causeless harm, if I did not take care to use the necessary means of preventing it. Whatever therefore an innocent person may accidentally suffer, whilst I am doing what I am at liberty to do, it must be looked upon as a natural misfortune. There is no injustice on my part; if he only suffers what is unavoidable, without my submitting to what the law of nature does not impose upon me. Nor is there any want of benevolence; unless benevolence obliged me to have a greater regard to another man's life, than to my own.

Defence
of limbs or
of chastity.

VI. † When a man is in danger of being maimed or a woman of being ravished; the manner, in which Grotius accounts for the right of defending themselves against these injuries, would lead one to imagine, that in his opinion the measure of what we may lawfully do, in the defence of our person, is to be taken from the evil, which we should suffer if we were not to defend ourselves. The reason, which he gives, why the assailant may lawfully be killed in such attempts as these, is,

† Grotius *ibid.* § VI. VII.

that one of our principal limbs or our chastity is of equal value with our life. As if, upon supposition, that what we are likely to lose is not of equal value with our life, it could not lawfully be defended at the expence of his life, who endeavours to take it from us.

But I have already shewn, and Grotius upon another occasion acknowledges, that he, who attempts to injure me, gives me an indefinite right against him, a right, which knows no measure, besides the attainment of the end, for which the law of nature allows it. Since we are not obliged to submit to such injuries, as we have just now been speaking of, we are at liberty, that is, we have a right, to defend ourselves against them: and the law, which allows this liberty, cannot be supposed to forbid any of those means, without which such liberty would be ineffectual.

But the observation of Grotius concerning the value of what would be lost in an attempt to maim or to ravish, though it is of no weight at all in settling the justice of defending ourselves to the utmost extremity, may be of use to shew, that it is not inconsistent with benevolence to repel such an attempt at the expence of the assailant's life: because no rule of benevolence obliges us to love one another better than ourselves; which must be the case, if we were ready to spare his life, though with the loss of what is of as much value to us, as his life is to him.

VII. "Strict justice would allow a man to repel the slightest injury to his person, such as a blow or a box on the ear, by any means, which the aggressor makes necessary. The principle so frequently mentioned already is applicable to this case. As the law of nature does not oblige a man to submit even to such injuries as these, he is naturally at liberty, or has an indefinite right, to repel them. But where the suffering is so slight to the person attacked, and the much greater evil

Defence
against
slight per-
sonal inju-
ries.

" Grotius *ibid.* § X.

of death would be the consequence to the aggressor, if defence was carried to the utmost rigour of strict justice; natural benevolence would teach a man rather to bear the injury, than to ward it off, at so great an expence to the aggressor, as that of his life.

Honour
what.

VIII. * We hear it indeed frequently maintained, that a mans honour will require him to kill his adversary, if he can; not only that he may ward off such an affront, but even that he may revenge it, after it has been received. And it may not be altogether foreign to our purpose to take this opportunity of enquiring into the meaning of the word honour, and into the rules of conduct, which this principle is supposed to suggest.

It is no very easy undertaking to explain a word, which is used by all men very unsteadily, and by most without any meaning at all. Grotius says, that honour is the opinion of our worth or excellence. He does not tell us, whether he means, that any mans honour is the opinion, which the man himself has, or the opinion which other people have, of his worth and excellence. In the former sense the definition of honour, as it signifies a principle of action, is not true; and in the latter sense it is unintelligible. The true definition of a word may always be substituted instead of the word itself. Try therefore to substitute the definition, which Grotius gives of the word honour, instead of the word itself; when you affirm, that your honour will not suffer you to do such or such an action, or that your honour requires you to do such or such another action. Do you mean, that your opinion, or the judgment which you make, concerning your own worth or excellence, is the principle, which influences you to do or not to do this or that action? If this be the case, then every thing is consistent with a mans honour, which he can

* Grot. *ibid.*

reconcile to his own opinion, whatever the rest of the world may think, or whatever the rules of right reason may determine about it : and a man, who had debased his mind and corrupted his judgment, would easily prove to you, that cowardice and treachery are as consistent with a principle of honour, as courage or fidelity.

Grotius however, when he speaks of honour as consisting in the opinion of our worth and excellence, did not mean a mans own opinion of these qualities in himself, but the general opinion of mankind concerning them. But if honour has such a reference to the opinion of others, as this definition supposes, it will be nonsense for a man to talk of his own honour, unless we add something to the definition, which will give it likewise a reference to himself. If it is considered without any such reference to himself, merely as the opinion of other men, he cannot speak of it as a principle within his own heart. If we call it a sense of the esteem or regard of mankind, a desire of raising and preserving in them an opinion of our worth and excellence ; the definition will be intelligible. And I will endeavour to shew, that this is the true notion of honour, as far as the word is used with any steady meaning, or with any meaning at all.

When the word honour is made use of by these, who call themselves men of honour, to denote a principle of action, which influences their conduct ; if any analogy of language is observed, or if it signifies any thing like what the same word is used to signify upon other occasions, we may judge what this principle is by attending to the import of some very common expressions. What do we mean, when we say, that we honour a man ? The plain sense of such an expression is, that we think highly of him, or that we regard and esteem him. What is it then to behave honourably, but to behave in such a manner, as to deserve to be honoured ;

that is, in such a manner, as to deserve the regard and esteem of mankind? Now there seems to be no difference between behaving honourably, and behaving with honour : so that to behave with honour, and to behave in such a manner, as to deserve the regard and esteem of mankind, are the same thing.

If this is the fundamental rule of honour, it will be easy to see what principle it is, which puts a man upon observing such a rule. Nothing but a desire, that mankind should think well of us, or a sense of reputation, can lead a man to behave in this or that manner, merely because mankind will esteem and regard him for such behaviour. One would think, that such a principle of action as this could seldom mislead us : because the general opinion of mankind, though it is not a demonstrative standard, must be allowed to be at least a probable standard of what is right and virtuous. General opinion is nothing else, but the common sense of mankind, or the common judgment of reason : and it is not likely, that mankind should universally approve any thing, which is generally hurtful, or any thing indeed, which is not generally beneficial.

Mistakes
in matters
of honour,
whence
they arise.

IX. The mistakes in this matter arise either from our making use of a wrong standard in judging what is honourable, or else from our applying the true standard in a wrong manner.

We make use of a wrong standard, whenever our sense of reputation is confined to a few, and does not extend itself to all ; whenever we desire to be thought well of by a small party of men, instead of desiring to be thought well of by mankind in general. A few men may easily be mistaken in their judgment, a small party may be determined, by caprice or private interest, to regard and esteem us for such qualities or such conduct, as would make the rest of mankind think meanly of us. And in fact there is scarce any

conduct so scandalous, but some will be found to countenance and encourage it. If then we mean by our honour only a sense of reputation amongst the few, that we converse with, amongst people, whose humane or interest is the same with our own ; it is no wonder, if honour and virtue should sometimes be found to differ from one another. But this notion of honour is plainly a partial one, and may for that reason be justly called a false one. He cannot be said to act upon a true principle of honour, who is esteemed or thought well of by only an inconsiderable number of men ; whilst he appears to the rest of the world to act meanly or basely.

Suppose however, that we make use of a true standard of honour, and look upon no actions to be consistent with our honour, but such as are in general esteem ; we may possibly be misled in our judgment by a partial application even of this standard. If an action consists of several different parts, or may be considered in several different views ; some one part of it, taken separately from the rest, may deservedly be had in general esteem ; the action, when we view it only on one side, may be such as mankind would approve, that is, it may be such as a true principle of honour would suggest. And whilst we attend to this part of the action, or whilst we consider it in this single view, we may look upon it to be consistent with our standard of honour : whereas, if we had attended to all the parts of the action, or had viewed it on all sides ; we should have seen such a mixture of meanness or baseness in it, as would have convinced us, that it could never either obtain or deserve a general esteem, and that no sense or desire of approving ourselves to the common judgment of mankind could ever lead to it. The same partial application of the standard of honour, which misleads us in judging of

actions, misleads us likewise in judging of the characters of men. We attend so much to some striking part of their conduct, as not to observe the rest of it. — And it is only by this means, that many have had the credit of being men of honour, who, if their whole conduct had been as much attended to, would have been found to deserve contempt, and would justly be ranked amongst the meanest and basest of the species.

There is one very common mistake about the notion of honour, which may perhaps not be thought to arise either from the use of a partial standard of honour, or from a partial application of the true standard. The mistake, which I mean, is, that courage and honour are by many people looked upon as one and the same thing. Men, who are soon provoked, who carry their resentment upon the slightest occasions to the utmost extremity, and are prodigal of their lives to gratify their revenge, have assumed, and would appropriate to themselves, the title of men of honour; though they have scarce any one good quality, that can give them any pretensions to it. The case seems to be this: men of true honour, that is, men, who have a sense of esteem, and a desire to obtain the general good opinion of mankind, are tender of their reputation, and make it a principal part of their happiness to behave in such a manner, as to deserve to be well thought and well spoken of. Upon this account they cannot bear to have their character lessened, and would rather hazard their life, than submit to any causeless aspersions. Thus as a true principle of honour naturally produces courage, or as men of true honour are commonly men of courage; the quarrelsome and the revengeful have mistaken the matter, and have imagined, that the converse must be true too, that men of

courage must be men of honour. They have this advantage on their side, that no prudent man chuses to call their title to this character into question: and they are therefore weak enough to please themselves with fancying, that their title is a good one. Courage indeed is in some stations of life an useful part of a man's character. A soldier could not discharge the duties of his station, if he did not maintain a general opinion of his being possessed of it. The rule of benevolence would scarce dissuade a man, who is placed in such circumstances, as make courage a necessary or valuable part of his character, from doing what justice allows of, if he could not avoid doing it without a general imputation of cowardice: not because the law of benevolence does not bind him, or does not command him, as well as other men, to sacrifice his own lesser happiness to the greater happiness of another; but because the good, which he is enabled to do in his station by preserving the reputation of courage, is greater than the good, which he would do by submitting to injuries; where he cannot submit to them without forfeiting that reputation. But if they, whose station and circumstances have not made courage a necessary or useful part of their character, will resent or guard against slight affronts with the utmost rigour, that strict justice will allow of; it is their business to consider, how well they comply with the natural dictates of benevolence; it is much too difficult a task for me to undertake.

X. As the law of nature does not oblige us in strict justice to part with our lives, or our limbs, or our chastity, and does, by not obliging us to part with them, allow us to defend our persons; * so neither does it oblige us to give up our goods to those, who would unjustly rob us of them. And from this natural liberty of keeping our goods, in opposition to those, who would unjustly take

Defence
of our
goods.

* Grot. *ibid.* § XI.

them from us, our right of defence arises, that is, our right over their person, as far as such a right is necessary for preventing their attempt.

It is plain from the foundation of this right, that it must be an indefinite one, or that we are not naturally debarred from proceeding to extremities in the defence of our goods; where the obstinate injustice of such, as would take them from us, makes this behaviour necessary. For as the law of nature does not oblige us to part with our goods, it cannot be supposed to prescribe any particular means of defending them: since to prescribe such means, as the only lawful means, would in effect be obliging us to part with our goods, when those means fail. And such injunctions, as these, would plainly make property nothing, or would give all persons, who had a mind to deprive us of our goods, a power of doing so; provided they only took care to render the prescribed means ineffectual for the security and preservation of them.

Grotius indeed, in order to justify killing a man in defence of our goods, observes, that the inequality of value between his life and our goods is made up by the favour of the law towards our innocence, and its aversion towards his injustice. But he was led to think this observation necessary by a principle, from which he reasons elsewhere upon a like question: it seems to have been his opinion, that the evil, which the law of nature allows us to do in our own defence, ought not to exceed the evil, which we should suffer, if we were not to defend ourselves. This principle has already been shewn not to be true: and it is the more to be wondered at, that Grotius should proceed upon it, since in speaking of what may be lawfully done in defence of our persons, he maintains, that they, who attempt to injure us, give us, by such an attempt, an unlimited right against them; as far as such a right is necessary for preserving ourselves from the harm,

which they design to do us. And it is plain from hence, that he was aware both of the true foundation of our right of defence, and of the true extent likewise of this right.

⁊ But he had a favourite principle in his mind, that we ought not to take away any ones life immediately or directly for the sake of preserving our goods. He allows however, that we may defend them, till our own life is in danger, and then we may justly kill the robber: because in these circumstances, the robber loses his life, immediately or directly for the sake of preserving our own life, but remotely only, or indirectly, for the sake of preserving our goods.

Upon this principle, as he imagines, we are to account for the distinction, which the laws of Moses, of Solon, of Plato, and of the twelve tables have made between a thief, who robs in the day, and a thief, who robs in the night; when they allow the latter to be killed, but forbid killing the former. Witnesses, he says, can scarce be supposed present in the night, to explain how the death of the thief happened: and for that reason the law supposes favourably, that the person, who killed the thief, did not do it merely for the sake of preventing the loss of his goods, but that whilst he was defending his goods, his life was brought into danger, and that he was forced to take this method of preventing himself from being killed. Whereas in the day-time there can be no room for such favourable presumption: when others are present or could readily come in, if they were called for; it would easily appear whether the person, who kills the thief, was in danger of his life or not: and since the law, when witnesses are to be had, presumes no more in his favour than he can make out, it forbids the killing a thief so robbing in the day time, because it intends, that no man should lose his life directly for the sake of preserving anothers goods.

The allowance, which these laws granted to kill a thief in the night, can scarce be reconciled with what Grotius here supposes to be the intention of the law-givers. But in order to reconcile such an allowance with such an intention, he makes use of several arguments to shew, that those laws presumed the person, who killed a night-thief to be in danger of losing his own life. The chief of these arguments depends upon what he observes concerning the law of Moses, that it required the thief to be found with such an instrument as is used in stabbing: and urges, that if the law allowed him to be killed, only when he was found so armed, it must in this permission proceed upon the presumption, that he attempted to make use of the weapon, with which he was found. But suppose instead of calling the instrument, with which he was found, an instrument for stabbing, we were to call it an instrument for breaking through; this evidence for the presumption, which Grotius supposes the law to proceed upon, will be taken away at once: no one from finding that the thief brought with him a crow-iron, or a file, or a saw, or any other instrument of this sort, which might help him in getting into the house, would think this any evidence, that he had been making an attempt upon the life of the master of such house. And perhaps after all, the word, which Grotius translates an instrument for stabbing, and which I have translated an instrument for breaking through, may be very properly rendered by our English translators, when they describe the thief as being found, not with any particular sort of weapon, but in the act of breaking through.

However without being at the trouble of examining into this nicety, we need only read the words of the law in order to inform ourselves of the reason, upon which it proceeded in making a distinction between the

two sorts of thieves. ^z The law says, — “ If a thief be found breaking up, and be smitten, that he die, there shall no blood be shed for him : if the sun be risen upon him, there shall be blood shed for him ; for he should make full restitution.” The plain reason, why the law did not allow a day-thief to be killed, is here given : he ought not to be killed, because he should have made full restitution. The law had an opportunity of coming in to assist a person, who was robbed in the day-time, and of taking care that proper justice should be done between him and the thief. And if this was the reason, why a day-thief was not allowed to be killed, we may easily infer from thence what was the reason, why this was allowed in the case of a night-thief : the ordinary penalty of theft could not readily be inflicted ; and men might therefore be encouraged, by the hopes of impunity, to steal in the night-time, if some other method was not made use of to deter them. With this view the law, when it could not come in to a persons aid, left him to his natural liberty, and gave him leave to defend himself, by whatever means he should find to be necessary.

It may here be asked, why the law of Moses, which did not punish theft with death, if the thief was taken, should indulge private persons in a license of proceeding farther than it would proceed itself. ^a Puffendorf affirms in general, that none of those lawgivers, who permitted a night-thief to be killed, decreed any capital punishment against theft, if the thief was taken. This however, though it is true of the Mosaic law, is certainly not true of all the rest. The law of the twelve tables decreed a capital punishment against a slave for theft. And the laws of Solon made theft capital, where the value of the thing stolen exceeded fifty drachmas, or where the theft was committed in a bath, or in a

^z Exod. XXII. 2.^a B. II. Cap. V. § XVII, XVIII.

place of exercise; that is, where persons laid aside their cloaths or other things of value, which they usually carry about with them, and were otherwise employed, so as not to be upon their guard, it was capital to steal.

We may from hence make two observations in passing. First, when the law of the twelve tables, or Solons laws allow a person to kill a thief in the night, but forbid the killing a thief in the day; the lawgivers could not proceed in this latter prohibition upon the principle, which Grotius imagines them to have had in view, the principle of not taking away any ones life directly upon account of our goods: because the Roman law punished theft in a slave, and Solons law punished theft of goods to a certain value and in certain circumstances, with death. And if the lawmakers proceeded upon no such principle, it will be difficult to shew, that, in the former permission of killing a night-thief, they proceeded upon the presumption, that such a thief was killed, whilst the person, whose goods he was endeavouring to steal, was brought into danger of his life.

Our second observation relates to that part of Solons law, which punishes theft in a bath with death, and to the apparent reason of this law, which has been already assigned. Where the owners of the goods stolen are not upon their guard, nor can be supposed to be so, the penalty of theft is greater, than where goods of the same value are stolen in other circumstances.

We may apply this to the case of a night thief. Men are less upon their guard, and are less able to take care of their goods in the night than in the day. It was necessary therefore for the law to give them a better security against being robbed in the night, by making the consequence of such theft more dangerous, than the consequence of stealing in the day. And this seems in general to be a prudent rule in making laws, to guard

against such crimes, as are most easily committed, by the highest penalties; and to take care, that the security, which is wanting in the nature of the thing, may be supplied by the severity of what the law threatens.

This leads us to the true answer to that enquiry from whence we have digressed. The law of Moses, though it does not punish theft with death, where the circumstances are such, as to give the injured person what the law calls full restitution; yet in other circumstances it grants the best security, that it could, by allowing the injured person to defend his goods as he can. What the Mosaic law says concerning a night-thief cannot properly be called the establishment of a penalty: it only leaves a man in this instance to his natural liberty. In the case of a day-thief the law appoints a certain penalty, forbids the person, upon whose goods the attempt is made, to kill the thief, and declares him to be guilty of murder, if he kills him. But in the case of a night-thief, it does not command, that he should be killed, but only says, that, if he should be killed, no notice shall be taken of it. In respect then of a day-thief the natural right of defence is abridged by the law; but in respect of a night-thief, the words of the law are merely permissive, and may be looked upon as a declaration, that every man was at liberty to defend his goods against such a thief, in any manner, that he pleased.

If we consider the law, as it relates to a night-thief, in this view, that is, as a simple permission, it will lead us to conclude, that the author of the law of Moses looked upon the defence of our goods, even at the expence of the life of the thief, as consistent with the law of nature. The law gives a man no authority to kill a night-thief, which he would not have had, if no law

had been made about a thief of either sort: it only supposes, that such a thief may happen to be killed, and then declares, that the man, who kills him, shall not be punished for it. As this is a simple permission, it leaves men to the liberty of nature: and as the law exempts the person, who thus defends his goods, from any punishment; it plainly shews what sort of defence was looked upon by the lawmaker to be justifiable, where men were left to that liberty.

Since then such a defence of our goods, as may end in the death of him, who endeavours to take them from us, has been shewn to be consistent with natural justice; the only remaining enquiry is, whether it is consistent with benevolence, or whether, for the sake of preserving the life of the robber, we ought not in tenderness to his welfare, though not in strict justice, to part with the goods, which he endeavours to deprive us of. But the question, when it is thus stated, does not take the matter far enough back. The first enquiry ought to be, whether benevolence, or a tender regard to the welfare of the robber, obliges us rather to part with our goods, than to defend them at all: because all the consequences of such defence are to be charged to his account, and not to ours: it arises wholly from himself and not from us, that the loss of his life should come in competition with the loss of our goods. If the preservation of our goods was in the first instance consistent with benevolence, and we take no other measures to preserve them, than what his violence, or the manner of his attack upon them, makes necessary; whatever event may happen to follow, from our defence of them, it must be considered as his act, who pushes us to extremities, and not as ours, who had no design of doing more, than benevolence would have warranted. Supposing therefore the matter in question to be of no great importance to our happiness, but to be such as we can well

spare, without any considerable damage either to ourselves or to those, whom we are bound in duty to take care of, and to provide for; benevolence would persuade us to sacrifice it to mutual peace, to part with it rather than to engage in any contention about it. But if we are in danger of being plundered of all, that we are worth, or of losing what is necessary to our own happiness, and to the proper discharge of that duty, which we owe to our relations and dependents; benevolence, which not only teaches us to shew our first kindneses to them, who have deserved the best of us, but which requires no more of us towards any one than to love him, as well as we love ourselves, would not oblige us to part with it.

We find, that even the gospel, when it commands us not to resist injuries, has explained this precept in such a manner as to shew, that we are to understand it of lesser injuries only. ^b “If any man will sue thee at the law, and take thy coat from thee, let him have thy cloak also.” Though the precept, not to resist injuries, is delivered in general words, the instance made use of to explain it is an evidence, that he, who gave it, did not design to extend it to all instances of property. If he had illustrated his meaning by instances of the highest injuries, we might have been sure, that the precept included all lesser injuries: but as he chose to illustrate it by an example of a slight loss, there is by no means the same ground for concluding, that he designed to include all greater losses.

One thing however benevolence seems strongly to recommend to us, which is to give the robber as good notice, as we can, and as the disturbance, into which he throws us, will permit us to give him, that we are determined to defend our property by all such means, as he shall make necessary: and when we have done

^b Matt. V. 40.

this ; if he persists in his design, the fault will be entirely his own, and no want of kindness to him can reasonably be charged upon us, whatever may be the consequence of his violence.

The liberty of defence, which we have now been explaining, is greatly abridged, where the parties concerned are members of the same civil society. But I shall defer considering in what manner it is abridged, till I come to speak about the nature of civil society, and of the effects, which are produced in our natural rights, by the institution of it.

C H A P. XVII.

Of Reparation for damage done.

I. *Damage and fault, what they mean.* II. *Right to reparation, whence it arises.* III. *Imperfect right, no foundation for demanding reparation.* IV. *Perfect and imperfect rights are sometimes confounded.* V. *Some rules to be observed in estimating damages.* VI. *Accessories to an injury obliged to make reparation.* VII. *Damages how to be demanded from a number of principals.* VIII. *Reparation due for the consequences of an unlawful act.* IX. *Reparations for unjust death.* X. *For maiming, wounding, beating, unjust imprisonment.* XI. *For adultery, or for debauching a woman.* XII. *For theft.* XIII. *For slander.* XIV. *Reparation due, where there is no malice.*

I. **A**N injury, after it is committed, produces a right in them, who have suffered any damage by it, to demand reparation of such damage, from the authors of the injury: and it produces likewise a right of inflicting punishment.

Damage and fault what they mean.

^d By damage we understand every loss or diminution of what is a man's own, occasioned by the fault of another. And by a fault we understand every unlawful action or omission.

It is proper to observe here, that though every unlawful act or neglect is a fault; yet every such act or neglect does not lay the person, who is in fault, under an obligation to make reparation: no such obligation is produced, unless the fault occasions some damage,

^e Grotius ut sup. § II.

^d Grot. Lib. II. Cap. XVII. § II.

that is, unless it occasions some loss or diminution of what some other person has a strict right to. A man is chargeable with a fault, that is, he is chargeable with behaving unlawfully, whenever he does not comply with the law. But in many instances he may behave unlawfully, and yet be under no obligation to make reparation to any one. All actions or omissions, which are contrary to the several duties included in the general virtue of benevolence, are faults; but such faults as these give no person any right to demand reparation. The notion of reparation is unintelligible, where no damage has been done: and whatever want of benevolence there may be, in not giving to a man what he had reason to expect, or what he had an imperfect right to; there can be no damage in it: because damage is some loss or diminution of what is strictly and properly his own.

It is to be observed farther, that the definition of damage extends the notion of it beyond a man's goods. His life, his limbs, his liberty, an exemption from pain, his character or reputation, are all of them his own, in a strict and proper sense: so that the loss or diminution of any of them gives him a right to demand reparation from those, by whose fault they have been lost or diminished. Nor is the notion of damage confined to the loss or diminution of such things, as are a man's own by the immediate gift of nature, or by such a general compact of all mankind, as that is, which introduced property. It is a damage to him, if he suffers any loss or diminution of such things, whether corporeal or incorporeal, as any particular compact or any positive laws may have made his own. Thus a servant by withholding the service, which his bargain has given his master a right to, does damage to his master. And a guardian by neglecting to take such care of the affairs of his ward, as either the nature of

the trust, which he has undertaken, or the positive laws of his country oblige him to, does damage to such ward.

II. As the law of nature forbids us to hurt any man, it cannot allow any act of ours, whereby another is hurt, to stand good, or obtain any effect. But the law, if it does not allow such act to stand good, or to obtain any effect, must, after we have done it, require us to undo it again. The only way of undoing it again, or of preventing the effect of it, that is, the only way of satisfying the law, is to make amends for what any person has suffered, who was hurt by it, or to make reparation for the damages, which such person has sustained. The same law therefore, which guards a man from being hurt, by requiring others not to hurt him, gives him a demand upon them, when they have done him any hurt, to undo it again, or gives him a right to demand reparation of damages.

Right to
reparation
whence it
arises.

If such reparation is refused, the law, which gives him a right to it, allows him to support this right by all such means, as are necessary for that purpose: because a right, which he is not at liberty to enforce and bring into execution, is in effect, no right at all. He therefore, who has suffered any damage by the fault of another, may, consistently with the law of nature, by the use of his strength, that is, by force, endeavour to obtain satisfaction by making reprisals upon the person, who has done the damage, to the value of what he has lost.

We have already seen by what means and upon what account the property in such things, as are so taken in reprisal, will be transferred from their former owner to the person, who takes them.

III. * An imperfect right, as was just now observed, can be no foundation of a claim to reparation. We cannot properly be said to suffer damage in what is not

Imperfect
right no
foundati-
on for
demand-
ing repa-
ration.

* Grot. *ibid.* § III.

our own: however reasonable our expectations of receiving a thing or a service may be, the most we can say, where they are refused us, provided they were matter of favour and were not due to us in strict justice, is, that we are hardly or unkindly used. Indeed in common language, a man, who is very hardly or very unkindly used; who meets with no reward or encouragement of his merit from such, as ought to reward or encourage him; who is not relieved in his distress by such, as ought to relieve him; is said to be injured, or not to have justice done him. We sometimes go farther, and say, that his merit or his sufferings give him a claim to such or such instances of encouragement and assistance. But when we make use of these or the like expressions, upon occasions of this sort; the words, injury, or justice, or claim, must not be understood in their strict and proper sense. Nothing is due to a man in strict justice, he has no strict and proper claim to any thing, but what is his own: and whatever pretensions either his merit, or his sufferings, may give him to the favour and assistance of others; however others may transgress their duty by not shewing him such favour, or by not giving him such assistance; those pretensions on his part amount only to a reasonable expectation, that they should give him something, which is not strictly his own, till they do give him it: and consequently the neglect or omission on their part cannot in propriety of speaking be called an injury.

Perfect
and im-
perfect
rights are
sometimes
confound-
ed.

IV. But in many questions, concerning what a man has suffered, whether it gives him a demand for reparation of damages or not; it will be necessary to attend carefully to the matter in dispute: because he may, in many instances appear, to have only been disappointed, in what he had no more than an imperfect right to, when in fact he has been deprived of what was properly his own, and has suffered a real injury.

If we would not be misled in questions of this sort, we must distinguish between a right to a thing or a service, and a right to ask for, or to be capable of receiving, such thing or such service. The former may be an imperfect right; the giving us the thing or doing us the service may be matter of favour in the persons, who have the disposal of them; so that no damage would be done us, if, upon our application, we should meet with a refusal; though it might be ever so reasonable on our part to expect; and though they might not discharge their duty, as they ought to do, by not granting us, what we ask for. But in the mean time the latter right, the right to ask for such favour, or to be capable of receiving it, may be a perfect one; so that whoever unjustly hinders us from asking, or renders us incapable of receiving, does us such a damage, as would entitle us to reparation. If I am ever so well qualified for any particular office or employment, and my competitor is ever so far inferior to me in the necessary qualifications; yet if the person, who has the disposal of such office, may give it to whom he pleases; it is in some sort matter of favour, that he should give it to me: and if he was to give it to my competitor, I could only complain of being unkindly used, or unfairly rejected; I should have suffered no such injury, as would entitle me to reparation. But suppose, that either by force or by fraud I had been hindered from applying for this favour; they, who, hindered from would have done me an injury properly so called: my liberty of applying, or not, was strictly my own; and they, who have unjustly taken it from me, or prevented me from using it, have done me damage. Indeed in estimating this damage, I could not rate it at the full value of the favour, which I might have asked for, if they had not prevented me: because, if I had asked for it, I might possibly have been refused.

What I have lost therefore by their injustice is not the favour itself, but the chance, which I had for obtaining it : and the damages, which I have sustained, are to be rated according to the value of that chance. It may be matter of favour, that a person should leave me a legacy : and however reasonable it might be in me to expect it, and however unkind or even ungrateful in him to disappoint my expectations ; yet the disappointment would be no damage. But if unjust force or fraud is made use of by any one else, to prevent him from doing it ; he, who thus prevents him, does me an injury : the capacity of receiving this favour was my own ; and to take it from me, by unjust force or fraud, is properly a damage, and reparation is to be made for it. In some instances more persons than one may suffer by the same act ; and though it may in respect of some of them be only a hardship, yet in respect of the rest it may be a real injury. If I have the care of a minor's estate as his guardian, and unkindly or unreasonably remove the steward of that estate, who had deserved well of me in all respects, and was particularly well fitted for his employment, in order to put in some other person ; this would be no injury to the steward so removed, nor would it entitle him to damages : because as the giving him this office at first was matter of favour, so it is matter of favour likewise to continue him in it. But if by this act of mine the ward is a loser ; such loss is properly an injury to him : and if I did it knowingly, he would have a natural claim to reparation for the damages, that he suffers by it.

Some
rules to be
observed
in estimat-
ing da-
mages.

V. ^f In estimating the damages, which any one has sustained, where such things, as he has a perfect right to, are unjustly taken from him, or withholden, or intercepted ; we are to consider not only the value of the thing itself, but the value likewise of the fruits or

^f Grot *ibid.* § IV.

profits, that might have arisen from it. He, who is the owner of the thing, is likewise the owner of such fruits or profits. So that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself. But it is to be considered, whether he could have received these profits without any labour or expence: because if he could not, then in settling the damage, for which reparation is to be made, the profits are not to be rated at the full worth of them; but an allowance is to be made for the labour or expence of collecting or receiving them; and when the labour and expence is deducted from their full worth, the remainder is all, that he has lost, and consequently is all, that he has any right to demand.

Grotius, in estimating these damages, makes another allowance, which does not appear to have any reasonable foundation. He thinks, that in making reparation for the profits arising from a thing, where the thing itself is restored, a deduction ought to be made for any improvements, which it has received, whilst it was withholden from the owner. But certainly in the case of dishonest possession, whatever improvements the possessor makes in a thing, whilst he unjustly detains it from the true owner, they must be understood to be made against the consent of such owner: for it is against his consent, that the other has the thing in his possession, and has an opportunity of improving it: and it would be an injury to force him to pay or to allow for what was done against his consent.

§ In rating the damage, which a man has sustained, we are to estimate something more than the present advantage, which he has lost: for the hope or expectation of future advantage is worth something: and if such hope or expectation is cut off by the injury,

§ Grot. *ibid* § V.

the value of it is to be allowed him. We must however, in estimating this hope, be careful not to estimate it, as if the advantage had been in actual possession; proper deductions are to be made for the accidents, which might have happened to disappoint his expectations. And in proportion as these accidents are greater, or more in number, or more likely to happen, a greater abatement is to be made in consideration of them. In general, the longer time there is to pass, before the expected advantage can arise, the more room there is for accidents to prevent its being obtained. And for this reason, other circumstances being equal, the more remote a mans hope is, the less it is worth. Thus in general, all other circumstances being the same, a field of corn, when it is destroyed in the blade, is worth less, than if it had been in the ear.

Accessories to an injury obliged to make reparation.

VI. ^b Besides the person, who immediately does the injury, others may be so far concerned in it, as to be under an obligation with him of making good the damages arising from it.

As far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us, as well as upon him: if he is considered as the principal party, we by our concurrence make ourselves accessories in the injury.

We may make ourselves accessories to what another man does two ways, either by our acts or by our omissions: and in either of these ways we may be accessories in a higher or a lower degree.

They, who have authority over him, that does the injury, and command the doing it; they, who give their consent, when the injury could not have been done without such consent; they, who assist the principal party in doing it; or they, who protect and screen him after

^b Grot. *ibid.* § VI. VII. VIII. IX.

it is over, are any of them accessories to the injury in a higher degree, and make themselves so by their acts.

They, who were obliged in justice to make use of their authority in forbidding the injury, and have not forbidden it; they, who were obliged in justice to assist him, who has suffered the injury, and have not assisted him; are accessories likewise in a higher degree, and make themselves so by their omissions.

Accessories in a lower degree are such, as advise the injury, or commend and encourage him, who does it. These become accessories by their acts.

Such likewise are accessories in a lower degree, as do not dissuade the commission of the injury, when they ought to dissuade it, or do not discover it, when they ought to discover it. These become accessories by their omissions.

Any of these, as far as they contribute towards the fact, by which the damage is done, are obliged to make reparation for it: because so far the fact is their own, and the damage arises from them.

VII. ⁱ A number of men may so concur in doing damage, as to be all of them principals. In this case they are obliged all and each of them to make it good, if the act is such an one, as arises from each of them alone, though they happened to be all together, when it was done, and all contributed towards the doing it; that is, if the damage, which they have all done by a joint act, would have been the same, though only one of them had been concerned in it. But if in the whole damage, which is done by them all, only one part arose from one of them, and another part from another of them; then each of them is obliged for no more than his own share of the damage: because the rest of it did not arise from him.

Damages
how to be
demanded
from a
number of
principals.

ⁱ Grot. *ibid.* § XI.

We may explain this rule farther by distinguishing between indivisible and divisible acts. Those are called indivisible acts, in which many persons may concur; but the whole act would have been the same, though only one of them had been concerned in it. Thus if a number of people join in setting fire to a mans stacks of corn, or in cutting a bank to drown his lands, the whole damage arises indeed from their joyned act; but the single act of each of them would have produced the same damage. The person therefore, who has been injured, has a demand for the whole damage upon each of them: because the whole would have been produced by the same act of each: and he has a demand for no more than the whole upon all of them together. So that if all of them can be come at, they are obliged to join in making reparation: or if only one of them can be come at, he alone is to make the whole reparation.

Where the act is a divisible one, that is, where part of the damage is done by one of the persons concerned, and part by another; so that the part, which was done by the one, can be distinguished from the part, which was done by the other, and without the concurrence of them all the loss would not have been the same; in this case all of them together are obliged to make good the whole damage; but each of them alone, considered as a principal, is not obliged to make good more of it, than what arose from himself. If a man is attacked upon the road, and one person wounds him, whilst another kills his horse; the whole damage arises from both of them together, but not from each of them alone: each therefore, as a principal, is not obliged to make good more of the damage, than what arose from his share in the act.

VIII.^k Not only the damages, which a man sustains from an unlawful act, are chargeable upon them, who do the act; but those damages are likewise to be made amends for, which are the consequences of such act; though perhaps these consequential damages might not originally have been intended. If it was otherwise; if he, who does an unlawful act, was not accountable for all the harm, which arises from it either immediately or in consequence; the whole obligation to reparation might in most instances be set aside, upon a pretence, that what the author of the damage originally intended was little or no harm to the sufferer, and that all the rest arose merely from accident. A man sets fire to a tree or to a stack of straw, and in the event a house is burnt: if he was not accountable for this consequence of his act, as well as for the act itself, he might easily pretend, that he did not design to do this harm, even though he did design it: and thus, for want of being able to disprove the truth of this excuse, the sufferer might lose reparation for such losses, as the incendiary did really intend. His intention ought therefore to be judged of by what appears: and by this rule of judging, there will be reason to conclude, that such consequences of his act, as might have been foreseen, and ought to have been guarded against, were in his intention, as well as the act itself.

Reparation due for the consequences of an unlawful act.

We may put this matter in another light. All the harm, that we are obliged to prevent, is justly chargeable upon us, if we do not prevent it. We are obliged to prevent all the harm, that arises in consequence from an unlawful action; because we are obliged not to do the action itself. Upon this account therefore all the harm, that arises from such an action, though by consequences, which we did not directly intend, is chargeable upon us; and the reparation to be made for such harm is to be made by us, who do the action.

^k Grotius *ibid.* § XII.

Reparati-
ons for un-
just death.

IX. ¹ Grotius has applied these general rules concerning reparation to several particular instances. He, who kills another unlawfully, is obliged to defray such expences, as the person killed may have been at in endeavouring to have his wounds cured. He is obliged likewise to make amends to those, who had a right to be maintained by the deceased; such as his wife, or his children, or his parents; according to the value of what they might have expected to receive from him, considering his age, his fortune, or his employment.

It may perhaps be questioned, whether they had a strict right to such maintenance or other benefits, as they might have received from the deceased: and if they had not; it may be asked, what restitution can be due for the loss of that maintenance or of those other benefits? But to this we answer, that however they might have been disappointed in their expectation, yet the expectation itself was their own, and it is a real injury to take it from them. All therefore, which can be proved from this objection, is no more than we allow, that the reparation is to be estimated, not according to the worth of their maintenance, or of their other probable benefits, but according to the worth of their expectation.

Grotius here distinguishes between the murder of a free man and the murder of a slave: the life of the former cannot, he says, be reckoned in settling the damage done by his death; because no person has any claim to it, besides himself: but the life of the latter is to be reckoned; because, if the slave had been alive, the master might have sold him; and consequently his life itself is of value to the master. But if we observe, that the life of the slave can no otherwise be looked upon as the masters property, than as he had an in-

¹ Grotius *ibid.* § XIII.

terest in it, we shall find that there is no occasion for this distinction: since as far as the relations of a free man had an interest in his life, the person, who murdered him, is obliged to make them reparation. So that in either case, in settling the damage, the life of the deceased is estimated according to the interest, which those, who survive him, might have in it.

X. ^m He, who has maimed another, does not make him full reparation for the damage sustained; unless he pays for the cure, and gives him, besides such payment, the value of what he has lost by being rendered incapable to earn so much by his labour, as he otherwise might have earned, if he had not been maimed. But these particulars, which are all that Grotius mentions, do not include the whole of the damage. He ought farther to pay for the loss of the persons time, whom he maimed. Our author indeed adds, that if the person maimed is a slave, amends is to be made to the master for any scar or blemish, which will make the slave worth less, when sold; but that in estimating the damage done to a free man, no regard is to be had to such blemish. Grotius should here have taken another particular into the account, which would have set him right in this respect, by shewing him, that satisfaction is to be made to a free man, as well as to the owner of a slave, for any scar or blemish arising from their being maimed. The person, who is maimed, has a right to freedom from causeless pain; and he, who has hurt him, has injured him in this right. He may therefore demand smart-money, or some consideration in amends for the pain, which he has unjustly suffered. Now under this head we may fairly include any blemish, which remains, after the first smart or pain is over: for as far as the injured person had a right to be free from such blemishes, or from the uneasiness, which

Reparation for maiming, wounding, beating, unjust imprisonment.

^m Grotius *ibid.* § XIV.

any deformity will occasion to him, he has a right to be paid for having them brought upon him. If the person, who has been ill treated, should escape without losing his limbs or the use of them; yet, if he has been wounded, the expence of cure, the loss of time, the pain, which he has felt, are all of them damages, for which reparation is due. Or if he has been only beaten, so that there has been no expence of cure, and no loss of time, he has still a demand of smart-money, or of satisfaction for the pain that he has felt.

What has been said concerning maiming, wounds, or blows will be sufficient to shew what sort of amends is due to a man, who has been deprived of his liberty by unjust imprisonment. His loss of time is one article in the account, but it is not the only one; the mere uneasiness of such a situation, under which we may include the disgrace attending it, is a damage to him.

Reparation for adultery or for debauching a woman.

XI. ⁿ Grotius in the case of adultery takes notice of no other reparation, except that of indemnifying the injured husband from maintaining the spurious offspring, and that of securing the legitimate children against the loss, which they would sustain, if the others were to share with them in the possessions of the family. But certainly neither of these particulars can be looked upon as reparation for the damages, which the adulterer has done: they are rather cautions against any future damage, which might arise in consequence. The adulterer has deprived the husband of his wife's affections, has disturbed the peace and order of his family, and has brought disgrace and infamy upon it. These are the articles to be estimated in determining what reparation is to be made for the damages, that have been done already.

If a woman is debauched, says our author, either by force or by fraud; he, who has so debauched her, is

¹ Grotius *ibid.* § XV.

obliged to make amends for the advantage, which she might otherwise have made by some future marriage, if he had not hurt her character. He adds, that if the man debauched her under a promise of marriage, he is obliged to make his promise good. But this obligation, one would think, arises rather from the promise itself, than from the damage done. He could not indeed object her want of chastity, as a sufficient reason to release him from his promise: because, as her want of chastity has been owing to his own act, he cannot make use of this pretence to her disadvantage, unless he pays her, not only for having hurt her prospect of marriage in general, but likewise for her loss in not marrying him in particular.

XII. ^o A thief or robber is obliged to restore what he has stolen, or an equivalent for it, with all its profits, and a compensation for the loss, which followed, or the gain, which ceased to the owner, for want of possession. In estimating the value of the thing and of the profits, Grotius lays it down for a rule, that they are to be rated neither at the highest, nor at the lowest, but at the middle price. However he gives no reason, and it will be difficult to find any reason, why such a degree of favour should be shewn to a man, who has been guilty of theft. Reparation for theft.

XIII. ^p A man may be injured in his person not only by death, imprisonment, maiming, wounds, or blows, but by scandal or defamation, which deprives him of his reputation and casts a blemish upon his character. These damages are repaired by asking pardon, by a public acknowledgment of his innocence, and by such payments as will make him amends for the loss, that he has sustained by any false aspersions. Reparation for slander.

^o Grot. *ibid.* § XVI.

^p Grotius *ibid.* § XXII.

Reparation due, where there is no malice.

XIV. The obligation, to make reparation for damages done by our means, is not confined to those actions only, which are criminal enough to subject us to punishment. Though there is no degree of malice in an action, by which another is injured, yet it may arise from some faulty neglect or imprudence in him, who does it, or is the occasion of its being done: and when any person has suffered damage, for want of his taking such care, as he ought to have taken; the same law, which obliged him, as far as he was able, to avoid doing harm to any man, cannot but oblige him, when he has neglected this duty, to undo, as well as he can, what harm he has been the occasion of; that is, to make amends for the damage, which another has sustained through his neglect.

Those faults, which consist in neglect, are sometimes divided into three degrees; a great fault, which is such a neglect, as all men may well be supposed, and ought to guard against; a small fault, which is such a neglect, as discreet and diligent men are not usually guilty of; and the smallest fault, which is such a neglect, as the most exact and most prudent take care to avoid.

Indeed in many instances of gross faults, it is so difficult to distinguish between the mere neglect and a malicious design, that, besides the demand of reparation for damages done, some punishment may reasonably be inflicted upon the person so offending.

Sometimes, and especially in what may seem faults of the lower degrees, the damage, which arises from our supposed neglect, will be found upon enquiry to have been rather owing to the neglect of the person, who suffers it; and then we are not only clear from all guilt that may subject us to punishment, but from all blame, that might oblige us to make reparation.

A man professes some art or calling, in which he is not completely skilful, and through his want of skill, they

that employ him suffers damage; or, supposing him to understand his business, they, that employ him, may suffer the like damage, through some gross neglect of his: in either case he is obliged to make reparation. This is the case, when a physician destroys his patient by administering improper medicines through ignorance, or suffers him to perish by neglect and desertion. Such faults as these are of the grosser sort, and approach so near to ill designs, as not easily to be distinguished from it. ^a If others suffer by us, whilst we are engaged in any sport or diversion, as if a man was to be killed or maimed by our discharging a gun; notwithstanding we had no design of doing hurt to any one, and can make this appear, yet we are bound to make reparation: because we ought to have been so careful, in following our own amusement, as to prevent any damage, that might happen to others, from what is merely matter of pleasure to us. If a soldier is exercising himself in an improper place, and does any hurt with his arms, it is his fault, and he must repair the damage. It would have been otherwise, if had been in the place appointed for this purpose; because then what hurt was done by him would have been owing to their fault, who knowingly or negligently came in his way. A feller of wood kills a man, who is passing upon a road or near a town, with the limb of the tree, which he is cutting down, without giving notice, that it was falling: this is his neglect, and reparation is due, from him. But if he did give notice, and the person, upon whom the limb of the tree fell, neglected to get out of the way, he is not chargeable with the damage done. Nor could he have been chargeable with it, even though he had given no notice, if he had been felling wood at a distance from the road or in the middle of the field: because the other person would have been in fault for having been there. The damage,

^a Puffendorff. B. III. C. I. § VII.

which a mans servants do, is in many instances chargeable upon himself : because he ought to take care, that they should behave better. If a traveller loses goods in an inn, where he lodges, the master of the house ought to repair the loss : because a discreet and diligent man would take care to provide himself with honest servants, and would prevent whatever was under his charge from being stolen. If the traveller had locked up his goods in his own apartment ; there would not be the same reason for charging the loss of them upon the master of the house : because the traveller has then taken the care and security of them upon himself ; and if they are lost, it is but reasonable to consider them as lost through his own neglect : especially as there would otherwise be room for collusion between him and others, who might take them away with his privacy. When any thing, which is thrown out from a window, does any damage to persons passing by in the street ; the master of the house, from whence it is thrown, is chargeable with it : he is certainly in fault, if he threw it out himself : and he is in some fault, though some one else threw it out : because he ought to take better care of the behaviour of his family. The damage which a man's beasts do, may reasonably be looked upon as done by himself : because it is his business to take care, that they shall be kept in good order. Indeed if they were put into their proper place, and have gotten into the grounds of another man, because this other does not keep up his fences ; the damage is done through the neglect of the owner of the cattle. In like manner if a man was passing through grounds, where there was no common path or way, and where he had no business, and should be wounded or maimed by a horse or an ox, which were in the pasture of their owner ; the fault is in the person so hurt ; because he ought not to have been there.

C H A P. XVIII.

Of punishment.

- I. *Punishment what.* II. *Justice of punishment depends upon the ends of it.* III. *What those ends are.* IV. *The justice of punishment explained.* V. *Extraordinary tortures in capital punishments unjust.* VI. *Obligations arising from a crime what.* VII. *The justice of punishment is negative.* VIII. *Who may punish in a state of natural liberty.* IX. *What crimes punishable by man in the liberty of nature.* X. *What guilt is.* XI. *How guilt is estimated.* XII. *Measure of punishment how adjusted.* XIII. *Mercy or clemency how exercised.* XIV. *How the goods of a criminal are affected by punishment.* XV. *Accessories to a crime punishable.* XVI. *Those, who have no share in a crime, not punishable.* XVII. *Obligation to punishment does not descend from the ancestor to the heir.*

I. **A**^r Crime, as it does damage, obliges the criminal to make reparation; and as it shews a disposition to do harm, it makes him liable to be punished. Punishment, what.

By punishment we understand some evil of suffering, which is inflicted upon account of some evil of doing. It is some pain or uneasiness, some loss or harm, which he, who has designedly occasioned any pain or uneasiness, any loss or harm to others, is made to undergo.

II. ^s Grotius lays it down as a self-evident principle, that he, who has done evil, may justly be made to suffer evil. If this principle was as clear and indisputable, as our author supposes it to be; one of the greatest Justice of punishment depends upon the ends of it.

^r Grot. L. II. C. XX § I. p

ibid.

difficulties relating to punishment would be removed. It would be ridiculous to enquire, why it is just to punish a criminal; if the justice of making a man suffer harm, who had done harm, was self-evident.

He does not seem however to be quite satisfied in his own mind, that this principle will entirely justify us in punishing criminals. The most, that he thinks can be proved from it, is, that no injury is done to a criminal by punishing him: but yet, he says, it does not follow from hence, that criminals are to be punished.

It is not very easy here to understand his meaning. If by saying it does not follow from this principle, that criminals are to be punished, he means, it does not follow, that we are obliged in duty to inflict punishment upon criminals; this is very certain. But his enquiries concerning punishment might, notwithstanding this difficulty, have stopped at this first principle, if the principle had been self-evidently true: it may not perhaps be sufficient to prove, that inflicting punishment is a duty: but let him carry his enquiries as far as he will into the ends of punishment, he will still find the same defect, if it is a defect, in all other principles. Neither the supposed self-evidence of its being lawful to make them suffer evil, who have done evil, nor any of the ends proposed in punishing will prove that we are naturally obliged in duty to punish a criminal. But if, when he says, it is no consequence of his principle, that criminals are to be punished, he means, that notwithstanding there is no injury in making those suffer evil, who have done evil, it is no consequence, that they may be punished, consistently with the law of nature; he plainly contradicts himself: if there is no injury in punishing criminals, it must undoubtedly be consistent with the law of nature to punish them.

^t Grot. *ibid.* § IV.

To reconcile him with himself, we must suppose him to mean, that though the punishment of a criminal is self-evidently consistent with the law of justice, yet we ought to enquire farther, whether the law of benevolence or humanity does not forbid it: because as some pain or loss is contained in the notion of punishment; such pain or loss would be a sufficient reason against inflicting it; if no advantage arose from it, or no beneficial purposes were answered by it.

But then these beneficial purposes are as necessary to be taken into the account in order to reconcile the notion of a right to inflict punishment with the duties of justice, as to reconcile the actual inflicting of it with the duties of humanity. All causeless harm or loss, that we bring upon another, is unjust: and if punishment is not intended in its own nature to obtain some useful end; I see not how we shall be able to shew, that the loss or harm implied in it is not causeless harm. Upon the whole then, it seems necessary for us, in vindicating the justice of punishment, to consider the ends, which are proposed by it: since the principle, which Grotius lays down as a self-evident one, cannot be shewn to be true, without having recourse to the purposes, which punishment is designed to answer.

III. ^u Our author takes notice of three ends, which are designed to be brought about by inflicting punishment; first, the benefit of the criminal himself; secondly, the benefit of the person, who has suffered by the crime; and thirdly, the benefit of mankind in general.

The ends of punishment what they are.

The two last of these may well be included in the single end of preventing the criminal from offending again: for by this means the benefit either of the injured person, or of the rest of mankind, is produced as effectually, as the punishment of the criminal can produce it, if we look no farther than the criminal himself.

^u Grot. *ibid.* § VI.

Punishment has indeed sometimes a farther view, and is designed not only to prevent or discourage the criminal who undergoes it, from offending again, but to deter others likewise from following his example, for fear of meeting with the same treatment, that he has met with. But this is only a secondary end of punishment; it may, where a criminal has deserved to suffer, make it prudent not to pardon him, and may engage us likewise to punish him in a public manner. But if our right to punish had nothing else to support it, we should never be able to reconcile it either with justice or with humanity. For certainly to bring any harm or loss upon one man, that we may not suffer the like from others, is, in respect of him upon whom it is brought, no better than a causeless harm or loss.

The first end of punishment, which Grotius mentions, is likewise but a secondary one. If there is no other reason for inflicting punishment besides the amendment of the criminal; this alone is not sufficient to justify it, when men live out of civil society. In the liberty and equality of nature every mans interests are in his own hands; he may pursue his own good, or he may neglect it, at his own discretion. Others may advise him what course to take, as most for his benefit; but if he should chuse to neglect his own benefit, they have no right to force him to pursue it; unless by his neglecting it they suffer some injury. Thus far indeed in the equality of nature the amendment of the criminal comes within the view of them, who punish him: they have a right as we shall shew presently, when he has done them any injury, to hinder him from doing so again: and as his amendment will answer this purpose, they may endeavour to correct his bad disposition, or may compel him to follow his own interest, in order to restrain him from breaking in upon theirs.

From what has been said it will appear, that the primary end of punishment is to prevent the criminal from offending again. And that the two secondary ends of it are to amend the criminal, and to deter others from following his example.

IV. Whilst a man takes care to live innocently, whilst he observes his duty, so as not to hurt any one ; we have no pretence to demand any security of him that he will not hurt us. The law of nature is our security: he shews by his behaviour, that he is sensible of his obligation to observe this law, and that it has authority enough with him, to prevent him from doing wrong. But when he has once done wrong, when he has transgressed this law, and has shewn by doing so, either that it has no authority at all with him, or not sufficient authority to secure us against suffering by his means ; it then becomes lawful for us to punish him; that is, it then becomes just upon account of the evil which he has done, to inflict such evil upon him, as will prevent him from doing the like again. We cannot suppose the law of nature to forbid our taking such measures with a man, as his conduct has made necessary for us to take, in order to obtain the end, which the law itself has in view. The law of nature intends to secure us against injuries. When therefore a man has shewn us by his conduct, that he is disposed to injure us ; this law leaves us at liberty to use such means as are necessary to prevent him.

The
justice of
punish-
ment ex-
plained.

The ways, by which we may prevent him from doing harm again, are by taking from him either the will to do it or the opportunities of doing it, or the power of doing it. If we make him undergo some corporal pain, submit to some disgrace, or suffer some loss; this may discourage him from offending again, or may take from him the will to do harm. If we shut him up

in prison, or employ him in constant labour, or force him to live at a distance from us, which in a state of civil society would be banishment, he will have few or no opportunities of hurting us. Death, which is called capital punishment, effectually puts it out of his power to offend.

The reader, I imagine, does by this time see clearly, what sort of a right over the criminal our right of punishing is, and for what reason some previous crime is requisite to give us such a right. Our right of punishing is nothing more than a liberty of using such means, as are necessary to secure us against suffering any farther harm from a person, who by having done harm already has shewn himself disposed to do it, if we do not take care to prevent him. But till he has shewn himself to be thus disposed by what he has done already, that is, till he has committed a crime, we have no such right over him. All force, that we make use of against him, all harm that we designedly do him, upon pretence of compelling him to observe his duty, when he always has observed it, or of preventing him from transgressing his duty, when he never has transgressed it, is unjust force and causeless harm.

Upon the whole, as on the one hand no punishment can be just, where there is no crime; so on the other hand, it would be impossible to shew, even after a crime has been committed, that we have a right to punish, or that punishment is just, unless we shew it from considering the end, for which it is inflicted.

Extraor-
dinary tor-
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nishments
unjustifica-
ble.

V. If the right of punishment is, what I have represented it above; if it is a liberty of using such means as are necessary to secure us against suffering any farther harm from a person, who by having done harm already, has shewn himself disposed to do it, unless we take care

to prevent him ; it will be no easy matter, where we punish capitally, to justify any extraordinary tortures in the manner of taking away the criminals life ; such as impaling, crucifixion, or breaking on the wheel.

The corporal pain, which a criminal is made to undergo, is not unjust ; where his life is spared : because such pain may correct his bad inclination, and, by taking from him the will to do harm, may serve to secure us against his doing any for the future. But certainly, when we take away his life, any pain that we give him, which might have been avoided, is so much causeless harm done to him. There is no occasion for this sort of discipline to be used in order to correct his evil disposition, when by putting him to death we take away from him the power of hurting us. The only use, that can be pretended in defence of such cruelties, is, that they will be a terror to others, who seeing what they are to suffer, if they do as he has done, will be more likely to be kept from doing so. And it must be owned, that this purpose, where we find it necessary to be pursued, will be sufficient to justify us in carrying our right of punishment to the utmost extent ; in not pardoning, where we should otherwise have been disposed to pardon ; in allowing the criminal as little time, as may be, to fortify himself against the apprehension of death ; in making his punishment as public, as possible ; in exposing his body or mangling it, after it is dead or insensible, and is by that means incapable of suffering any real harm.

But however we may design to terrify others ; a right to use such means, as the criminals behaviour has made necessary for us to use, in order to secure ourselves against any future harm, which he may do us, cannot possibly be construed to be a right to use him in such a manner, as we may think necessary, in order to se-

cure ourselves against any future harm, which other men may do as. Nor do I see upon what other principle such a practice can be justified; unless it could be shewn, that a right to punish is a right to treat a criminal in what manner we please.

Obligati-
on arising
from a
crime
what.

VI. We have seen what right arises over a mans person upon account of his having committed a crime: and it is plain from the nature of the right on one part, what obligation it lays upon him on the other part. A right in others to use such means as are likely to hinder him from doing harm again, that is, a right in them to punish him, implies an obligation on him to submit to punishment: for if he had any right or was naturally at liberty to resist punishment, they could not naturally have any right to inflict it.

The justice
of punish-
ment is ne-
gative.

VII. ^w When justice is divided, as Grotius divides it, into expletive and attributive; it may be a question to which of these two sorts punishment belongs. If the whole notion of justice is included in this division of it, our common ways of speaking seem to imply, that punishment belongs to one of these two sorts, or that either expletive or attributive justice is exercised, when we inflict punishment. There is certainly the appearance of exercising some sort of justice, when we say, that punishment is justly due to a crime, and that we have done justice by inflicting it.

Now expletive justice, or justice properly so called, consists in satisfying a mans strict demands, or in taking care, that he shall have what is strictly due to him. And attribute justice, which differs little or nothing from benevolence, consists in giving him all, that he has fair and reasonable grounds to expect from us, though he cannot properly demand it.

Punishment can scarce be thought to belong to this latter sort of justice; not only because there is no ap-

^w Grot. *ibid.* § II.

pearance of any benevolent affection in punishment; but likewise because punishment, instead of giving the criminal what he could not claim, takes from him something, which he otherwise might have claimed; it takes from him his life, or his liberty, or the use of his limbs, or his natural freedom from pain.

One would rather be inclined to think, at first sight, that it belongs to expletive justice; the common ways of speaking about it already mentioned would lead us to think so. And yet we shall find upon enquiry, that these are rather improper ways of speaking: because the criminal has no claim to punishment, or such a claim as we may be sure he very willingly gives up; so as to make it no injustice to him, no withholding of any thing, which he demands, if were not to punish him. If expletive justice is done to any one in punishing, it is to them, who inflict the punishment, and not to him, who undergoes it: their right and not his is satisfied by what he suffers.

The fact is, that justice, in the original notion of it, is a negative duty; it consists in doing no causeless harm, and implies rather the not doing what is wrong, than the actual doing what is right. But out of this negative duty, a positive one arises: the same law, which forbids us to do any causeless harm, must be understood to command us, where any one has suffered such harm by our means, to make him reparation. Now though expletive justice in its full extent comprehends both the negative and the positive duties of justice; yet it is more commonly used to signify the duties of the latter sort, those duties of justice, in which we are active. And in this sense we may venture to say, that expletive justice is not exercised in punishing; the act of punishing does not satisfy any demand, which the criminal had upon us. The justice of punishment is

rather of the negative sort; it is called just only because it is not unjust; it is rather the not doing what is wrong, than the doing what is right. But as the inflicting punishment implies some action, and is not merely a forbearance to act; we are apt to consider the justice of it, as of the positive, and not as of the negative sort; to call it doing justice upon the criminal or giving him what is his due, though in fact it is no more than not doing him injustice, or not taking from him any thing, which his crime has left him a claim to, if we have a mind to take it from him.

Who may
punish in
a state of
natural li-
berty.

VIII. If it was at all necessary, that he, who punishes a criminal, should be superiour to the criminal, it must in a state of natural liberty have been unlawful for any one to punish another; or though there is no injustice in the notion of inflicting punishment, considered in itself, yet in the equality of nature, no person for want of the necessary superiority could justly have inflicted it: however unlawful the action of punishing might be, when considered abstractedly from the agent; yet the institution of civil authority would be necessary to make it lawful for any person to do that action. But from what has been proved already, it will appear that no such superiority of the person, who inflicts punishment, over him, who suffers it, can be naturally required to make the action of punishing lawful in respect of the agent. Mankind in general, and he in particular, who has suffered by a crime, have an interest in restraining such injustice, as they are all likely to suffer by at another time, if it is not restrained. It is for the common good, that whoever will not listen to the dictates of reason, and obey the law of nature, in consideration of its ordinary sanctions, should be compelled to do his duty, or be prevented from transgressing it, either by being made to feel such

pain and inconvenience, in consequence of the mischief which he has done, as will incline him to behave better, or by being deprived of the opportunities or of the power to do otherwise. From this beneficial end of punishment we have shewn, that the law of nature allows of punishment, or leaves all mankind at liberty to inflict it : and it is impossible, that all mankind should be at liberty to inflict punishment, and yet that it should at the same time be unlawful for any of them to inflict it.

* Some inconveniencies might probably arise in the exercise of this universal right to punish, when the punishment is inflicted by the person, who is the immediate sufferer by what the criminal has done. His passions may be so much inflamed by what he has felt, as to mislead him in judging of the fact, and in proportioning the punishment to the guilt of it : or if he should be more calm, and not be transported by the more violent passions ; yet he would be liable to be biased in his judgment by some selfish regards ; few men being so little prejudiced in their own favour, as to be fair judges in their own cause.

Nor would the exercise of this right be without its inconveniences, if it was left promiscuously to others who are not so immediately affected by the crime. A promiscuous right to punish is not likely to be duly exercised ; even setting aside the consideration of passion and selfishness. It requires more diligence to search into the fact, more prudence to weigh all its circumstances, and more equity to proportion the punishment to it, than most men are masters of. Besides ; as it would be unjust to punish a man twice or oftner for the same offence, that is, to restrain him by force from offending again, when he has been restrained already ; so amongst a multitude of punishers it would be unlikely, that he should escape with being punished only once :

* Grot. *ibid.* § VIII. IX.

because it is unlikely, that where all have an equal right, the rest should acquiesce in what any one of them has done; or that they should all pay such a deference to the diligence and prudence and equity of any one, as not to dispute his pretensions to inflict the punishment in preference to themselves.

But the inconveniences, which may attend the exercise of a right, are no evidence, that such a right does not subsist: men may have a right of acting, notwithstanding it is possible for them frequently to abuse this right. If it was otherwise, we must be beholden to civil institutions, not only for the right of punishing, but for the rights of defence and of demanding reparation: since either of these two rights are as likely to be abused, as the right of punishing, where men are judges in their own cause. All that will follow from its being more probable that the right of punishing should be abused in the liberty of nature, than in a state of civil society, is no more than what might be proved by many other arguments, that the institution of magistrates with civil power is for the general benefit of mankind.

What crimes are punishable by men in the equality of nature.

IX. We shall find in our future enquiries, that many actions become so criminal in a state of civil society as to be punishable, which in the equality of nature men have no right to punish. At present we shall consider only what crimes are punishable by man, in a state of nature, before any civil connections were made, or any positive laws were instituted.

⁂ If the foundation of our right to punish has been truly laid, it will be obvious, that no crimes are punishable by mankind, but such as do harm, that is, none but such as contain in them some notion of injustice towards mankind. From whence it follows, that the only actions, which we have a right to punish in the liberty of nature, are those, which are naturally unjust.

If a man is void of benevolence, or wholly disinclined to do us good ; this is a breach of his duty indeed ; but it is such a breach, as must be left to the great Author of the law of nature to punish, who will undoubtedly take effectual care to vindicate the authority of his own laws : for what right can we have to make a man suffer for not doing what we had no right to demand of him ; however reasonable it might be for us to expect it from him ?

The law of nature commands men to be chaste and temperate ; and he, who established that law, will punish the breach of it. But if a man's lewdness or intemperance were to hurt no one but himself, it does not appear, that any man has a right to restrain him by force from following such evil courses.

The existence of a God is written throughout every part of nature in such legible characters ; and the duty of honouring him is so plain to every capacity ; that they, who disbelieve his existence, or deny him that honour, which is due to him, cannot but be understood to offend against the clearest precepts of the law of nature : they must be wilfully blind, if they do not see their duty, and perversely criminal, if they do not practise it. But till we have a right to demand, that men should believe this obvious truth, and practise this plain duty ; that is, till we are some way or other hurt, or some real injustice is done us, by the contrary ; it does not appear, that we have a right to punish those, who disbelieve the one, or refuse to practise the other. Civil connections, when we are united into societies, may give us this right, as shall be shewn in its proper place, they may make either atheism or irreligion punishable by us ; but it will be difficult to make out, that we have any such right in the liberty of nature.

Indeed whenever a mans want of benevolence changes, as it commonly does, into a want of justice; whenever his lewdness is attended, as it almost always is, with some harm to mankind; whenever his intemperance leads him to injure them; and whenever his irreligion is attended with its usual consequence of making him hurtful to them; as even in the liberty of nature they have a right to demand a contrary behaviour of him, they have a right likewise to use such means, as are necessary to make his behaviour what it ought to be, or to prevent it from being otherwise.

Grotius maintains, that one man is not punishable by another for any criminal intentions of any sort, not even when these intentions come to be known by some subsequent confession. And certainly the reason of the thing is on his side. The mere intentions of a man, whilst he keeps them to himself, cannot be punishable; because they are not known. And a subsequent confession of such intentions implys, that they are laid aside, before they are made public: in which case there can be no right of punishing; because there can be no right to restrain a man from doing an injury, where we have sufficient evidence, that he has already restrained himself.

We may add, that if by any means we come to the knowledge of his intentions; whilst they subsist, but have not yet been put into execution; we have no right to punish him for them: because the proper notion of punishment is an evil inflicted upon account of some crime, which has been actually committed: and whilst the crime remains in the intention, it is not actually committed, it is only beginning. However, in these circumstances, though we have no right of punishing, we have a right of defence, which is a right of doing much the same thing under a different name.

Our author mentions another sort of crimes, which he says are not punishable by man, and calls them such crimes, as human nature cannot avoid. It is not easy to imagine what crimes he had in his mind, when he gave them this general character. No action can be criminal, if it is not possible for a man to do otherwise. An unavoidable crime is a contradiction : whatever is unavoidable is no crime ; and whatever is a crime is not unavoidable. If indeed he only meant, that where a criminal act is not proposed to a man, though he may have a natural power of avoiding it, yet if he is threatened, in case he will not do it, with such an evil as human nature cannot well bear up against, this circumstance will greatly abate, if not wholly remove the guilt of his compliance ; this opinion can scarce be contradicted. But then an enquiry of this sort would have been made more properly, where he is treating of the manner, in which the guilt of a crime is to be estimated, than where he is enumerating the several sorts of crimes, which are not punishable by man.

X. Guilt is sometimes defined to be the obligation, which a man is under, to submit to punishment, in consequence of any crime, that he has committed. But this, one would think, cannot be a definition of it ; at least it does not suit at all with our common ways of speaking about guilt. We commonly speak of guilt, as if it was capable of being greater or less : whereas the obligation to punishment does not admit of degrees ; there is no medium between being obliged and not obliged. And certainly, if this is all that we mean by guilt, many propositions relating to punishment, which we frequently hear, and which seems to have some sense in them, must be very trifling and uninstrucive. When a man is said to deserve punishment upon account of his guilt ; the meaning would be, if this was

What
guilt is.

the true notion of guilt, that he deserves punishment, because he is obliged to submit to it. And it would be still more uninstruative to say, as we sometimes do, that a man is obliged to submit to punishment upon account of his guilt: for this would amount to no more, than if we had said, that he is therefore obliged to submit to punishment, because he is obliged to submit to it.

Let us try, whether we cannot find out some other definition of guilt, which will explain the notion of it with more exactness. Now it seems to be an agreed point, that guilt is that quality in a criminal, which deserves punishment, or which gives mankind a right to punish him. By attending therefore to the foundation of our natural right to punish, we may perhaps be able to find out, what that quality in the criminal is, which makes him deserve it. Mankind have a right to punish any person, or he deserves punishment at their hands; when his actions have shewn them, that he has a disposition to injure them, or to do them harm, unless they take care by forcible means to prevent him from doing it. This disposition therefore is what makes the criminal deserve punishment: and consequently, as far as men are concerned in punishing, we may define guilt to be a disposition to do harm, which has shewn itself by some actual harm already done.

How guilt
is estima-
ted.

XI. ² The guilt of a man is greater or less in proportion as his disposition to do harm, appearing from some harm already done, is stronger or weaker. Now there are two ways of judging how strong or how weak this disposition is; first from considering the nature of the crime itself, and secondly from considering the circumstances of the criminal.

Guilt, according to the notion of it just now explained, is undoubtedly a personal quality; because the

² Grot. *ibid.* § XXVIII, XXIX, &c.

disposition to offend is in the criminal, and not in the crime. However for the sake of speaking more distinctly upon this subject, I shall take the liberty, when we estimate the guilt of a person from considering the crime itself, which he has committed, to call it the guilt of the crime; and when we estimate it from considering the circumstances of the person, who commits a crime, I shall call it the guilt of the criminal.

In general the guilt of a crime is estimated by the evil or harm, which it does; not because guilt properly consists in such harm; but because any persons disposition to do harm is stronger or weaker in proportion to the greatness or the smallness of the harm, which he can bring himself to do. The harm, which others suffer by the crime of any person, is the immediate reason, why he should not have committed it: so that he, who does more or greater harm, breaks through stronger reasons forbidding what he does, than he, who does less harm: and the stronger reasons there are against offending, the stronger disposition to offend there must be in him, who can get over them. In short, there is so little difference between a disposition to do great harm, and a great disposition to do harm, that one of them may very well be looked upon as the measure of the other. Since therefore the guilt of a crime consists in the disposition to do harm, which the criminal shews by committing it; and since this disposition is greater or less in proportion to the harm, which is done by the crime; the consequence is, that the guilt of a crime follows the same proportion; it is greater or less, according as the crime, in its own nature, does greater or less harm. Thus as murder deprives a man not only of all his present happiness, but of the possibility likewise of obtaining any future happiness in this world; it does him the greatest possible harm, and is therefore considered

as a crime of the greatest guilt. The divine author of the Mosaic law places adultery in the next degree of guilt to murder; as it does a man the greatest harm, that he can suffer, next to that of losing his life, by robbing him of all his domestic joy and comfort. Theft, which takes from a man some of the means of happiness by taking from him his goods, implies much harm in it towards him, who suffers such a loss, and consequently a disposition to do much harm, in them, who are the authors of it: the guilt therefore of this crime being estimated by the rule here laid down, though it does not rise so high as that of murder, is little inferior to that of adultery. False aspersions, by which a man is injured in his character or credit, may and frequently do produce considerable harm to him, they are therefore crimes of some guilt: but because the harm is less certain, the guilt of such crimes is less, than that of the crimes before mentioned.

There are some circumstances attending the criminal act itself, which will aggravate the guilt of it; such as impiety towards a parent, inhumanity towards a friend, or ingratitude towards a benefactor. The want of piety, or of humanity, or of gratitude does not indeed seem to be punishable in itself: where men live in the liberty of nature: but if murder, or adultery, or theft, or slander, are attended with such circumstances; the guilt of these crimes is reasonably esteemed to be much greater, than it would have been otherwise: because where the same harm is done, a mans hurtful disposition must be greater, if he not only breaks through the obligations of justice, but such obligations likewise, as would, if he had listened to them, have engaged him to hold directly the opposite conduct, to advance the good and welfare of those, to whom he has done evil.

Thus far we have seen how the guilt of a crime is to be estimated : in which estimation we consider only the act itself and the circumstances of it. But when an act is done by some particular person, in order to determine his degree of guilt, regard must be had to the situation and circumstances of the agent, as well as to the nature and circumstances of the act. What is chiefly to be considered in respect of the agent, relates either to his knowledge, or to his freedom. As his understanding is more clearly informed, and enables him to see his duty more plainly ; or as his will is less forcibly restrained, and enables him to perform his duty more readily ; his guilt in transgressing that duty is so much the greater. He must have the strongest disposition to offend, who offends against the clearest evidence, and with the fewest restraints upon his freedom of choice. On the contrary, as entire and invincible ignorance of what ought not to be done, or an absolute impossibility of doing otherwise, would clear a man of all guilt ; so in proportion as he is nearer to such a state as this, his guilt will be less. That where the same crime is committed by different persons, their guilt should be considered as greater or less, in proportion as their knowledge and freedom were greater or less, seems to be agreeable to the common notions of mankind. When a person is driven by some great provocation to commit a crime, or when he is tempted to commit it in order to avoid some great evil, which he could not otherwise have easily avoided ; these are generally looked upon as circumstances in his favour, which lessen his guilt. But if a reason was to be asked, why these circumstances should have such an effect ; no reason can be given for it, but what is taken from the principle here advanced : the provocation, which he received, or the temptation, which he was under, have, either by clouding his understanding, prevented him

from seeing his duty, or by putting a force upon his will, prevented him from performing it. And in proportion as his view of what he is obliged to is less distinct, or his liberty of doing it is more restrained, his acts, however criminal they may be in themselves, have so much the less guilt in them, when considered as done by him in these circumstances : because they do not arise so much from any disposition in him to do harm, as from his ignorance, or his restraint, from his want of understanding, or his want of freedom.

But then it is to be remembered, that if ignorance or restraint are admitted in alleviation of a mans guilt, as rendering his act in some sort the result of necessity, rather than of his own disposition to offend, this ignorance or restraint must be such, as have not originally been owing to himself. An involuntary act, if the necessity, which drives us to it, was brought upon us at first by our own free choice, must in all reason be considered as a voluntary act. Thus, though madness might clear a man from any guilt in what he does, yet drunkenness, notwithstanding he, who is drunk, may be really mad for the time, would be no alleviation of it. If a man is provoked by blows and other ill usage to kill the person, from whom he receives them, whilst the smart is upon him ; such a provocation may be thought to lessen his guilt : but if he, by striking the first blow, was the occasion of what followed ; his guilt would not be lessened by what he felt himself at the time of committing the fact, and by the provocation to commit it, which he brought upon himself.

Measure
of punish-
ment how
adjusted.

XII. By these rules we may be assisted in judging how far the guilt of one person exceeds the guilt of another ; not only where they have committed different crimes, but likewise where they have committed the same crime. But in judging what punishment should

be inflicted upon a criminal, another comparison may be thought necessary, a comparison between the guilt of the criminal and the evil which is to be inflicted upon him ; that we may from thence be enabled to proportion the punishment to the guilt.

It is commonly said to be a proper rule of justice, that as much as the guilt of one person exceeds the guilt of another, so much the punishment of the former should exceed the punishment of the latter. If there was no other exception to this rule, yet it certainly does not come up to the point in question. For in this proportion guilt is compared with guilt, and punishment with punishment : whereas the question is, what rule we are to observe in comparing guilt with punishment. However clear we may think it, that of two persons, who have committed different crimes, and in different circumstances, he is to bear the greater punishment, whose guilt is the greater, and he the less punishment, whose guilt is the less ; this rule will never help us in determining what particular sort or degree of punishment is to be inflicted upon either of them. We may know certainly, that theft is a crime of greater guilt than slander ; and consequently that in like circumstances a thief may justly be punished more than a slanderer. But after we know this, the most material enquiry still remains undetermined : it will still be a question, whether theft is to be punished with death, or maiming, or slavery, or imprisonment, or whipping. There seems likewise to be a farther exception against this rule, which will prevent it from being universally applicable. The exception is, that amongst many crimes, all of which deserve death, the guilt of some is greater than the guilt of others. And if death is a just punishment for the least of these crimes, it is impossible to apply this rule in punishing

the others, which are greater: for the rule directs us to rise in our punishment, as the guilt of the crime encreases: whereas when the lowest of these crimes is punished with death, it will be impossible to rise higher in our punishment, though the guilt of the other crimes is greater. If theft deserves death, how are we to punish a murderer? if murder deserves death, how are we to punish paricide? you may think to answer this objection by surmising, that no crime is to be punished with death except murder. But certainly there are many other crimes, which betray such an evil disposition in the person, who commits them, that nothing less than capital punishment can secure us against him. And if you have a due regard to the authority, which established the Mosaic law, you will find, that your surmise is not well supported, and that God himself directed other crimes, besides murder, to be punished with death. Or if neither of these considerations will shew you, how little is to be said in favour of your opinion, you may ask yourself, whether murder is in all cases a crime of the same guilt? or to speak more properly whether the guilt of paricide is not greater, than the guilt of simple murder? If then simple murder is to be punished with death, we may go back to the question just now asked, how will you punish paricide? It is to be hoped, that you, who are so mild in your opinion, as to the proper punishment of other crimes, would not be so cruel in punishing paricide, as to think of adding tortures to death. Or if you should think of doing so, you ought to be informed, that your rule, if it would lead you to this, can never be a just one. We may torture, where we spare life, in hopes of amending the criminals bad disposition; or we may take away life, where there is no hopes of his amendment: but to take away life,

which is an effectual security against his offending again, and at the same time to torture, when death has made it impossible for us to amend him, is no better than an unwarrantable cruelty.

Another rule, which seems in some sort to be drawn from the primary end of punishment, is, that the evil, which the criminal is made to suffer, should be equal to the evil, which he has done. As the end of punishing him is to prevent him from doing the like again; we may think it likely, that by putting him into the place of the sufferer, and making him feel what he has made the other feel, he may be taught, by his own experience, how grievous it is to be born, and may by these means be brought to do so no more. It is, I suppose, some such rule as this, which they may have in view, who seem to be of opinion, that no crime besides murder ought to be punished with death. And as they seem to think it a merciful or rather a favourable rule, so there are others, on the contrary, who charge the law of Moses with excessive cruelty for establishing retaliation in some few instances. When these latter speak of the penalty of an eye for an eye and a tooth for a tooth, of burning for burning, wound for wound, stripe for stripe; they ask in their usual stile of declamation, whether any thing can be imagined more inhuman, than for a man, who has lost his eye or his tooth in the heat of a quarrel, to go in cool blood and thrust out the eye or the tooth of his neighbour? But before the impeach the Mosaic law of inhumanity for establishing such a penalty; they would do well to inform themselves, whether by that law it was not necessary, that there should be some malice in the criminal, who had defaced a man in order to subject him to the penalty of retaliation: and if this was necessary, we may reply to them, not only that what they talk

about the heat of passion can be no more than declamation ; but that other lawmakers have found great reason to carry the punishment for crimes of this sort much higher, and to make the malicious maiming or defacing a man capital. But be this as it will ; certainly retaliation, however proper it may be in some instances cannot be the universal standard of punishment. In some instances such a punishment is impracticable, in others it would be indecent and criminal. An incendiary, who has no houses or but few goods of his own, cannot be made to suffer the same evil, which he has brought upon those, whose houses or whose goods of great value he has maliciously burned. Forgery of a will in the liberty of nature, or treason against the state of civil society could not be punished by retaliation. The same may be said of an adulterer, who has no wife of his own ; and if he had one, this sort of punishment, whilst it endeavoured to correct a crime in one person, would engage others in the same crime. We need not enumerate any more instances : these, that have been mentioned, will be sufficient to satisfy the reader, that we must look for some other measure of punishment, besides this of retaliation.

We cannot easily find a better measure, than what the end of punishing suggests to us. Where we have sufficient evidence from previous facts, that a man is disposed to injure us ; the law of nature allows us to provide for our future security, by enforcing the criminal duty upon him, or by so restraining him, as to leave him either no opportunity or no power to transgress it. This is the end proposed in punishment, which justifies us in inflicting it. And certainly the measure or degree, in which we may punish, can only be determined by that end, which justifies us in punishing in any degree. Such degrees of punishment there-

fore are consistent with the law of nature, as are found to be necessary for obtaining that security against the criminal, which the law of nature allows us to require. The proper degree of punishment, if it is to be regulated by this principle, plainly admits of some latitude. The law of nature does not fix any precise point, below which we cannot fall, without inflicting it in too low a degree, and above which we cannot rise, without inflicting it in too high a degree. On the one hand indeed, there is no hazard of doing wrong: for as punishment is only allowed and not prescribed by the law of nature; a mans right to inflict it, in the liberty of nature, is entirely his own to make what abatements in it he pleases. But on the other hand, by inflicting too high a punishment we may exceed what is allowable: because we are allowed to inflict no more than our future security against suffering by the criminal requires: the right of punishing, though it is a mans own to make such abatements in it, as his prudence and clemency may recommend to him, is not his own to carry to any rigour or severity, that passion or revenge may prompt him to.

XIII. ^a There are two ways, in which mercy or clemency may exert itself in regard to the punishment of criminals. It may either remit the whole punishment; and then it is called forgiveness or pardoning; or else, in the latitude of punishing, it may engage us to try the lowest degree, in order to see how far this will answer the purpose, before we proceed as far as we lawfully might.

Mercy or clemency how exercised.

If indeed the law of nature enjoined, that punishment should follow a crime, it would be contrary to our duty to pardon a criminal. But since this law only allows us to punish; or since punishment is naturally just, only because the law of nature does not forbid it;

^a Grot. *ibid.* § XXXIV. XXXV. &c.

we are left at liberty to judge for ourselves, whether we shall inflict or remit it.

It is a mere fallacy to urge, that punishment is naturally due to a crime, and consequently that a just man, as he gives all men their due, cannot, consistently with this character, remit a punishment or withhold it from the criminal. For when punishment is said to be naturally due to a criminal, we certainly cannot mean, that the criminal has a right to demand it: we chuse indeed to speak affirmatively, and say, that it is due to him in justice; whilst our meaning is a negative one, whilst we only mean, that no precept of justice is transgressed, nothing which is due to him is either taken or withholden from him, when he is made to suffer for what he has done. A just man therefore may be obliged, if he would act up to this character, so to give all men what is their due, as not to withhold from them any thing, which they have a right to demand: but it does not follow, that he is obliged to punish a criminal, who is in his power; because as the criminal has no right to demand punishment, it is not due to him in this sense. If any one has in this case a right to demand; he, who inflicts the punishment, has a right to demand, that the criminal should suffer it; he, who suffers it, has no right to demand, that the other should inflict it. The right then of punishing, as it is wholly his, from whom the punishment comes, may, if he thinks proper, be waved or given up. By giving it up he uses this right as his own, and in the equality of nature is not accountable to any one for so doing.

Indeed a criminal, in this equality of nature, is not very likely to escape punishment. Where all have a promiscuous right of calling him to an account; it is a great chance, though one may pardon him, whether all will be equally inclined to clemency. ^b Cain seems

^b Gen. IV. 14.

to have been sensible, how little security he had in this respect; when, after the murder of his brother, he declares himself to be afraid, that every one who met him would kill him.

If this branch of clemency is consistent with the law of nature, there can be no question, whether the other branch, which consists in punishing in a low degree, is so or not. For if we are at liberty to wave our right entirely, we must certainly be at liberty to wave it in part, that is, to make such abatements in it, as we see convenient. Humanity towards the criminal will commonly persuade us to exercise this part of mercy, to be satisfied with the least degree of punishment, that may seem sufficient to restrain or correct his bad disposition.

Some circumstances either of the criminal himself, or of the crime committed by him, may justify us in not exercising this branch of mercy. The principal circumstance of the criminal is his having repeated the offence frequently, after he has been punished in these lower degrees: because this is an evidence, that these slighter punishments are not sufficient to answer the purposes, which are designed to be brought about by them. His having repeated the offence without ever having been made to suffer for it at all, ought however not to check our humanity towards him; since it does not then appear, that slighter punishments would not have amended him, if they had been tried.

The principal circumstances of the crime, which will justify us in not being satisfied with punishing in the lowest degree, are its being common or its being obvious. When few people are likely to follow the criminals example, or to do as he has done; we have nothing more to consider, than his particular case: he stands, as it were, alone; and if we have reason to

hope, that the slighter sort of penalties may correct what is amiss in his disposition, we need proceed no farther, than to inflict such slight penalties. But when many run into the same crime, and custom may seem likely to establish the practice of it, if care is not taken to prevent it; there is the greater necessity for being as severe, as justice will allow us to be, in order to deter others, who might be encouraged to offend, if they saw, that a man could offend either with impunity, or at the expence of only a small punishment. The facility of a crime, or its being obvious to be committed, does not encrease the guilt of it: there is no more guilt in offending, where it is easy, than where it is difficult; nay in fact the facility of a crime, considered in itself, may rather seem to lessen, than to encrease the guilt: because he, who can take the pains to offend, where great difficulties are in his way, shews a stronger disposition to offend, than he, who meets with few or no difficulties to oppose him. But the guilt of a crime being duly adjusted, the facility of it is a reason, why we should carry our punishment of it as high as justice will allow of. For where a crime is easy and open, it is more likely to be committed, than where it is difficult. And if we punish in order to secure ourselves, primarily indeed against the person offending, but secondarily against all others; there is more reason for punishing with all just severity, where we are guarded by nothing, but the fear of punishment, than where we are guarded by the very difficulties, which any person would meet with, who should attempt to injure us.

We may observe, that in civil society lawmakers have this rule in view; when they appoint and establish the penalty for breaking a law. As the mercy of an individual, in the liberty of nature shews itself in the

gentleness of the penalty, which he inflicts ; so the mercy of the law shews itself in the gentleness of the penalty, which it appoints. And it is usual for civil laws to forbid those crimes, which are the most easy to be committed, under higher penalties, than those of the like guilt, which are not to be committed without greater difficulty. The mercy of some laws, has restrained the natural license of punishing theft with death, and has established the penalty of restitution with encrease, where the theft is committed in the day-time ; or with slavery, when the thief has not wherewithal to make such an ample restitution as is required of him. But in the night-time, those laws leave the thief to the discretion of the person, whom he robs : that so, where it is more easy to offend in this way the person offending may run the hazard of suffering a higher penalty. Stealing cattle from the pasture, and stealing them from the stall, are crimes of much the same guilt. But the former is a crime more easily committed than the latter : and upon this principle the Mosaic law punishes the former with more rigour, and the latter with more clemency. Five oxen are to be restored for an ox, and four sheep for a sheep, in one case ; but a double restitution is made the penalty in the other case. The law says, ^c “If a man shall steal an ox or a sheep, and kill it or sell it, he shall restore five oxen for an ox, and four sheep for a sheep. If a thief be found breaking up, and be smitten that he die, there shall be no blood shed for him. If the sun be risen upon him, there shall be blood shed for him ; for he should have made full restitution : if he have nothing, then he shall be sold for his theft. If the theft be certainly found in his hand alive, whether it be ox or ass or sheep, he shall restore double.” The supposition of his being found breaking up, when, if the

^c Exod. XXII. 1. 2. &c.

theft is in the day-time, only a double restitution is required, shews that the cattle so stolen were supposed to be in some place of security.

What has been here said concerning mercy or clemency is applicable only, where men live in the liberty and equality of nature, or where the right of punishing is every mans own, so that he may abate the rigour of his demands, or entirely give them up, at his own discretion. But in civil society, where the magistrate punishes, he exercises the right of the public. His mercy therefore is to be guided by what he reasonably presumes to be the will of the public, and not by what he might be willing to do, if he was exercising only his own private right of punishing.

How the goods of a criminal are affected by punishment.

XIV. As we have here had occasion to mention a punishment by double or fourfold or five fold restitution, it may be proper for us to stop a while in order to consider, whether in the liberty of nature the person, who punishes, particularly if he is likewise the person, who has suffered by the crime, has any right to take possession of the criminals goods, or acquires any property in them, in consequence of the right to punish, beyond what is sufficient to make him satisfaction for such damages, as he has sustained. In civil society punishments by fines, or by confiscation, are very usual; and in some countries, the law may direct, that what is thus taken from the criminal shall go to the sufferer: as we find the Mosaic law provided in the instances just now taken notice of.

How the civil magistrate comes by the general power of punishment, and how he comes by this particular power over the criminals goods, will be the proper subject of some of our future enquiries. At present we are only to enquire how a criminals goods are affected by the right of punishing in the liberty or

equality of nature ; where there is no magistrate, in whom the exclusive right of punishing is vested, but this right belongs promiscuously to all.

It is plain, that loss of goods may bring about the ends of punishment several ways. Such a loss as this, like any other evil, which the criminal is made to feel, may teach him to behave better for the future, for fear of suffering such another loss, if he has still any thing left to lose. Where many of his goods are taken from him, so as to reduce him to a low condition ; he will have fewer opportunities of offending, than he had, whilst he had enough to maintain him in idleness. And these opportunities will be more particularly lessened, if his riches, whilst he had them, were either the principal motives to his crime, or the chief instruments that helped him or gave him the power to commit it. Since then the ends of punishing may thus be answered by deprivation of goods ; if we have any right to make a criminal suffer at all for these ends, we must have the same right to make him suffer in his goods, as to make him suffer directly or immediately in his person.

But the great question is, when the criminal is deprived of his goods, who has the property in them ? They cannot naturally pass to his children or relations, if inheritance is not a right of the law of nature. Nay, though inheritance was supposed to be natural, or though it had in a state of nature been introduced or established by general consent ; yet even then his children or relations could not, in virtue of such a right, claim to inherit the goods, which he loses. For inheritance is not a right to claim property in such things, as belonged to the ancestor, whenever his property in them ceases ; it is only a right to claim property in such things, as he leaves the heirs in possession of, when

his own property ceases by death. So that before his death, there can be no claim of inheritance upon any of his goods; and at his death there can be no claim of inheritance upon such of his goods, as he does not leave them in possession of. And he certainly no more leaves them in possession of those goods, which he has been justly deprived of in his life-time, than he does of those, which he has sold, or given away.

As the heirs of the criminal have no claim to such goods, as he loses in the way of punishment; so neither has the injured person any, considered merely as the injured person. He has indeed a right to so much of the criminals goods, as will make him amends for the damage, which he has suffered; but no reason can be given, why he should have a right to more; unless some positive law has given him such a right. The ends which justify punishment, will by no means extend his claim any farther than this. The criminal, by suffering in his goods, may be discouraged or prevented from offending again: but a design to discourage or prevent him from offending again can be no ground for that person, whom he has injured by offending once, to claim property in the goods, which he is deprived of. The ends of punishment may be answered by taking the criminals goods from him: but these ends do not require, that the property, which he loses, should be vested in the person, whom he has injured.

The person, who punishes, whether it is the same, that has been injured, or any one else, seems most likely to have, or rather to acquire, a right in such goods: not because he is at the trouble of punishing; but because, when he deprives the criminal of his property in them, he has the fairest opportunity of being the first occupant. The person, who undertakes to punish a criminal, has another opportunity, besides

this, of acquiring a right in the criminals goods. Most of the evils, which the criminal can suffer in his person, may be estimated in money or in goods; and he probably would willingly submit to lose as much money, or as many of his goods, as would make the evil, which he should feel by such loss, equal or nearly equal to the evil of some other punishment. Suppose for instance the punisher might imprison him, and he would readily give a sum of money rather than lose his liberty: in this case by his own voluntary act he might give the punisher a certain sum of money, in order to redeem himself from imprisonment; that is, he might chuse to bear one sort of punishment, rather than another: and, in consideration of the punishers being willing to change the sort of punishment, he might make over his right to that sum of money, or to any other of his goods of the same value.

After a number of men have originally acquired a general property, as a collective body, in all such things, as are distributed afterwards by that body amongst the particular members of it, and so become the private property of each individual, to whom they are thus distributed and assigned; we may, notwithstanding this, suppose each individual in respect of punishment to be still in a state of nature; that is, we may suppose the right of punishing to belong promiscuously to each of them. Whoever in these circumstances punished a criminal with loss of goods, could have no right to these goods, unless by way of commutation. If nothing has passed between the punisher and the criminal, except that the former has merely deprived the latter of his goods; such goods have then no particular owner: and if the punisher could claim them at all, he must claim them at the first occupant. But where a right of general property in the public or collective body

obtains ; such goods, as have no particular owner, do not cease to have any owner at all ; they revert to the public or collective body, and are not so in common, as that any one, who pleases, may lawfully seize them for his own, and acquire property in them by such occupancy. Suppose such a collective body of men to have approached a little nearer to the forms and institutions of civil society, and to have made over their general property to some one or more particular persons : then as all goods, which have no other owner, so those amongst the rest, which a criminal is deprived of in the way of punishment, will become the property of such person or persons ; that is, in the more common way of speaking, the goods of a criminal will, as a punishment for what he has done, be forfeited to him or them ; when deprivation of goods is the proper punishment of his crime, and any one thinks fit to inflict that punishment.

Accessories to a crime punishable.

XV. We have seen, that justice will allow us to punish the person, who commits a crime : but it may still be asked, whether we can, consistently with the same justice, punish any others besides him. ^d This question relates to two sorts of persons ; to such as are parties in a crime, though they are not the immediate doers of it ; and to such, as have neither done the criminal act, nor are any ways concerned in it.

As to the first sort of persons, those, who are parties in the crime ; they are plainly liable to punishment ; not for the guilt of another man, but for their own guilt ; not because a criminal act has been done by some one else, but because they had a share or were accessories in what that other person has done. The several ways, by which we may so far make ourselves parties in doing an injury, as to become parties likewise in the obligation to make satisfaction for the

^d Grot. L. II. C. XXI. § I.

damages arising from that injury, have been already explained. By the same ways a man may make himself so far a party in a crime, which another commits, as to be justly liable to be punished for it. They, who command a crime, who consent to it, when without their consent it could not have been committed, who assist the immediate actor in committing it, or who protect him, after it is committed; they, who are in strict justice obliged to forbid the crime, and do not forbid it, who are in like manner obliged to assist the sufferer, and wilfully neglect to assist him; they, who advise, or encourage, or countenance, what is done; and they, who ought to dissuade the crime, but do not dissuade it, or who ought to make it known, but conceal it; any of these are parties in it, or accessories to it: and if they have such a share in it, as evidences any evil disposition, they become liable to punishment.

It is however to be observed, that a man may be so far accessory to a crime, as to be obliged to make good the damage arising from it, without being liable to share in the punishment due to the guilt of it. Every neglect of justice, though in the slightest instances, obliges him to make reparation: because justice, even in the slightest instances, is what all mankind may claim of him. But punishment is inflicted to correct a bad disposition, or to prevent it from breaking out into future acts of injustice: and it is very possible, that through inadvertance, or by accident, a man may be the occasion of harm to others in the lower instances, without having such a bad disposition, as to stand in need either of correction or restraint.

In punishing a criminal and his accessories; when they, by whose authority or at whose instigation he committed the crime, can be found out, and are in our power; it is generally thought reasonable, that

we should be more ready to mitigate or to remit his punishment than theirs. The crime is supposed to begin from them; and we are willing to hope, that unless they had commanded or instigated him to do what he has done, the fact might never have been committed. But certainly this rule will in many cases be a very improper one. He, who is under the strongest temptation to commit a crime, has the least guilt; and whether we consider him as an object of our mercy or not, yet in point of justice he deserves the least punishment. Now it frequently happens, that his provocation, from whom the crime begins, is much greater than his, who carries it into execution. I may have provoked a man by some extreme ill usage, which puts him upon hiring an assassin to murder me: the guilt of the assassin who is prevailed upon by a small reward to commit the fact, is plainly the greater of the two: for he who can be brought so easily to commit a crime, must have a worse and a more dangerous disposition of mind, than he, who does not appear likely to have thought of committing it, if he had not been under the influence of a great provocation.

Those,
who have
no share
in a
crime, not
punish-
able.

XVI. ^c The principles already established, concerning the ends and the right of punishing, will sufficiently prove that they, who are no ways concerned in a crime, cannot with any appearance of justice be punished for it. If punishment is justifiable upon no other principle, but a design of correcting or restraining a disposition to hurt mankind; then where there is no crime to evidence such a disposition, that is, where there is no guilt, there can be no justice in inflicting punishment.

We do not indeed maintain, that no punishment can be justly inflicted upon a criminal, which shall, in any manner or by any accident whatsoever, affect an inno-

^c Grot. *ibid.* § IX. X. XI. XII.

cent person. Mankind are so connected with one another, that, if this was a true principle, it would be almost impossible to punish a criminal at all: for there is scarce any punishment, which can be inflicted, but what, by some accident or other, will in its consequences affect other persons, besides him, upon whom it is inflicted. No one is so much a solitary individual, as to be, in all respects, quite detached from the rest of his species: either our interests are mixed with the interests of others, or at least there are some, with whom we are connected by ties of affection. The death of a parent will commonly hurt his children; both upon account of the interest, which they had in his life, and upon account of the affection, which they had for his person. He cannot be maimed or imprisoned without their feeling it: they lose at least that pleasure, which they enjoyed from his company or his welfare, and are perhaps deprived of that maintenance, which they received from his labour. Even any corporal pain, though he is the immediate sufferer, affects them: it is a pain to them, that he should be hurt: and what is a disgrace to him, is, however we may reason about it, a disgrace to his family in the opinion of the world. Where a man is not attached to others by natural affection, he has many other connections, which will extend the consequences of his punishment to them. If he is in debt, and has no way of satisfying his creditors, but either by his labour, or by his going on in some gainful employment, which he had entered into, and which they perhaps had hazarded their money upon; his death, or his imprisonment, or his banishment, will be a loss to them. If he is a slave, his master will be a sufferer; if he is a master, his dependents will be sufferers; when any of the higher punishments are inflicted upon him. But the losses or evils, which any of these innocent persons un-

dergo, in consequence of a criminals punishment, is not a punishment to them. They suffer indeed; but they must look upon what they suffer as a natural misfortune, which was brought upon them, not directly, by the design of those, who inflict the punishment, but in consequence only of their accidental connections with the criminal, upon whom it is inflicted. All punishment may indeed be considered as some loss to them, who suffer it: but then all loss is not on the contrary to be considered as a punishment. Whatever loss we designedly and directly bring upon a man, if we do it upon account of some crime, that he has committed, it is a punishment; if we do it without any previous crime, it is an injury. Nay even such loss, as we bring upon a man in consequence of what we do, is an injury; if the act from whence this loss arises is an unlawful one. But the loss, which an innocent person suffers by the punishment of a criminal upon account of the accidental connection, that there is between such person and the criminal, is not either of these sorts. It is not directly or designedly brought upon him: nor is it the consequence of any act, which is in itself unlawful. He suffers it in consequence only of our doing what, in respect of the criminal, we had a right to do.

What has been already said may help to clear up the question, whether a criminal may justly be deprived of his goods, since they are by this means prevented from descending to his children, notwithstanding these children have no share at all in the guilt of his crimes. This punishment is, in this respect, no more exceptionable than any other punishment would be: since, as we have seen, in almost every other sort of punishment, his children and all others, who are connected with him, must in some degree or other suffer with him. And upon the same principles, that we justify any other sort of

punishment, we may justify this, in which the loss suffered by the children is not directly or designedly brought upon them, but only in consequence of our doing an act in itself lawful.

I am aware however, that this explanation of the matter is open to an objection. It may be asked, whether in calling the act a lawful one, which is attended with this consequence, we do not take the point in question for granted? The loss, which the children sustain; though we do not think fit to call it a punishment, may yet be an injury: as all losses are, which any innocent person suffers in consequence of our doing, what we ought in justice not to do. And to say, that our act of punishing a criminal, by deprivation of goods, is in itself a lawful one, is taking it for granted, that the act is lawful, notwithstanding the certain consequence of it is, that an innocent person will be hurt by it. However, this objection is not a very formidable one: for when we say, that the act is in itself a lawful one, we consider it as detached from this consequence. In the first place we may affirm, what has been proved already, that it is lawful to punish a criminal. And in the next place, we may affirm, that if a criminal was a solitary individual, who had no children and no relations at all, to whom his goods would descend at his death; it would be lawful to punish him by deprivation of goods. And if the act is lawful thus far; the consequences, which are not directly designed by him, who does it, but follow by the accidental connection between the criminal and his relations, are not chargeable upon him, as an injury to those relations.

Children have a right to maintenance from their parents; they have a right likewise to the pleasure, which they receive from the company, the safety, and the welfare of their parents. Now there is scarce any sort of pu-

nishment, but what will in some degree or other affect the children, when it is inflicted upon the parent. And yet we never hear the same complaints about the injury, which is done to the children, by punishing the parent in any other way, that are usually made about the punishing of him by deprivation of goods. Every one seems to be aware in other instances, that the loss sustained by the child is accidental, and that the view of what it must suffer, by the punishment of its parent, is not sufficient to make such punishment unjust. Though in fact the loss, which is suffered by the child in other instances, affects what may with more propriety be looked upon as its right, than the loss which it suffers in the instance of taking away the parents goods. For the child has no more than an expectation of succeeding to his goods; and this expectation depends upon the condition of his keeping those goods, till he dies. So that by depriving the parent of his goods, instead of taking away any right from the children, we only intercept the condition, without which they can have no right at all to them. ^f Puffendorff, after he had come to this conclusion, goes on to observe, that it was however, as Buchanan calls it, a truly unjust and barbarous law, which was made by Mogaldus King of Scotland, that all the goods of condemned criminals, were to be forfeited to the crown, excluding their wives and children from any part of them. If he does not use the word *unjust* in its strict and proper sense, it will be easy to reconcile what he here says with his former conclusion. For though the rigour of justice will allow of this; yet it might still be his opinion, that tenderness and humanity would persuade us to let the wife and children of the criminal enjoy, if not the whole, yet however some part of his goods.

^f B. VIII. Chap. III. § XXXI.

But perhaps he had in his mind another objection to such a law as this; an objection, which does not seem to have been much attended to. Though deprivation of goods may be justified, even against any supposed injury to the children of the criminal; when this is the only punishment, which he is made to suffer; yet it is still a question, whether he may be punished by death and by deprivation of goods too? All the reasons, upon which the justice of punishment is supported, are satisfied by the death of the criminal. He is effectually prevented from offending again, when his life is taken from him. And as we shewed before, upon this principle, that all unnecessary torture, that is, all pain, which might have been avoided in putting the criminal to death, is an injury to him; so here it may be asked, whether the accumulated punishment of death and deprivation of goods is not upon the same account to be looked upon as an injury?

If this was the whole of the objection; we might easily reply, that deprivation of goods added to death is not like unnecessary torture added to it. The criminal feels the unnecessary torture; and because he is then capable of feeling it, he is likewise capable of being injured by it. But deprivation of goods is more like exposing or mangling his body, after it is become insensible: if it is at all to be called taking his goods from him, it is taking them from him, after he has no longer any occasion for them, and can no longer feel the loss of them.

But here the case of the children returns, and gives new force to the objection. If they have a claim to inherit what their father dies possessed of; then to seize upon the goods of the father at his death, though it is no injury to him, will be an injury to them: because in this case seizing his goods is not merely intercepting

the condition, upon which the children had a claim to them ; it is taking the goods away in opposition to their claim.

Shall we say, that it is of great use for men to have a punishment of this sort before their eyes : since though they might be hardy enough to offend, where they themselves are to suffer alone ; yet their affection for their children will probably prevent them from offending, where they foresee, that if they do offend, these children must suffer with them ? But when we are enquiring about the justice of inflicting punishment, after a crime is over ; it is nothing to the purpose to give an answer drawn from the expediency of threatening a punishment before the crime is committed. It might be of great use to threaten, that if a man committed such or such a crime, his children should be tortured or be put to death before his eyes ; and doubtless to inflict a punishment of this sort in some instances, might be of great use in preventing others from offending. But the expediency of such a proceeding would never shew the justice of it. However just it might be, in respect of the parent, who upon account of his crime is made to suffer the anguish of so horrid a spectacle ; yet certainly it never could be thought just, in respect of the children, who are thus made to suffer torture or death, notwithstanding they are clear from the guilt of their parents crime.

Shall we say, that inheritance is an instituted right ; and that consequently, in a state of natural liberty, no injury is done to the children in cutting them off from inheritance ; because they had no right to claim it ; and that in a state of civil society, those, who institute the right of inheritance, may model it as they please, and may convey the goods of the father to his children, upon such conditions, as seem to them to be

most convenient. They may therefore, in view to the expediency of such establishment, appoint, that, where the father has been guilty of such or such crimes, all inheritance as derived from or through him, shall be cut off; and then, in consequence of this establishment, what, in the first instance was expedient only, becomes just: the child is not injured by this bar of his claim to inherit; because if the same laws, from which this bar arises, had not given him a claim to inherit, he would have had no such claim at all. This answer may be a satisfactory one, where the children have no right to the goods of their parents but by intestate succession. But it is plainly an insufficient answer; if the parent, or other ancestor, has been careful enough to make a will. For however inheritance in intestate succession may be the creature of civil institution; inheritance by will is coeval with property.

Shall we say therefore, that property itself and all the incidents of it, the power of making a will amongst the rest, is the effect of civil institution? This would be saying what cannot well be proved to be universally true.

But where property is considered as acquired in the gross, and as derived from the public to the individuals, in whom separate or private property is vested; the public might certainly make the grant of it to such individuals upon such terms and under such conditions, as seemed to be most expedient, or most conducive to the common good.

But even then it is to be remembered, that a general grant of property to the individuals can never be understood to be any bar to their disposing of their goods by will; unless this limitation is particularly mentioned. For as the right to dispose of our goods by will is naturally incidental to property; whoever grants

the one, does at the same time grant the other ; if no express condition is annexed, which may prevent it.

Upon the whole then we may come to these conclusions. Where a criminal is punished with death, supposing inheritance in intestate succession to be the creature of civil constitution, the children, or other relations of such criminal, have no claim to his goods, in the liberty of nature ; and consequently deprivation of goods can have no injustice in it. It cannot be unjust in respect of the criminal ; because, after he is dead, he does not feel the loss of them. And it cannot be unjust in respect of the children ; because in respect of them it is not properly deprivation ; it does not take from them any thing, which they had a right to ; it only prevents them from possessing what did not belong to them, any more than to any other person. — But though inheritance in intestate succession is supposed to be introduced by civil society, and to be established by positive laws ; yet inheritance by will is incidental to property and coeval with it : and consequently, where a criminal is punished with death in the liberty of nature, whoever claims his goods by will would be injured, if they were hindered from succeeding to them. — And though we consider civil society as in its infancy, which is the case where a body of men have the property of lands in gross, and individuals derive their private property from the grant of such body ; yet this principle would not be sufficient to justify depriving the heir of a claim under the will of the ancestor ; unless where it was otherwise provided by some express conditions annexed to the grant.

However we are to observe farther, that in civil society the established laws, to which, as we shall see hereafter, all the subjects consent, either mediately or immediately, operate in the same manner with such express conditions. Whether those conditions are made

at first, or are introduced with consent of parties afterwards; there is no injury on the side of the community, which makes use of them, as a restraint upon the behaviour of the subjects. So that in civil society, by virtue of the laws, the power of making a will may, consistently with justice, be taken away from criminals, who are punished capitally.

There is another case, in which such persons, as are innocent of a crime, seem to be punished for it; and that is where the guilt of the criminal is the remote cause, but some act of their own is the immediate cause of the evil, which they suffer. He, that engages either for the appearance of a criminal, when he shall be called upon, or for his future good behaviour, becomes answerable for such appearance or such behaviour, and makes himself liable to undergo the penalty, under which he engaged for either. The guilt of the criminal arising from some crime formerly committed, which made him liable to be called upon, in one instance, or his guilt arising from some future misbehaviour, in the other instance, is the remote cause, which subjects the sponsor to undergo what he voluntarily engaged to undergo, upon condition the criminal failed of appearing, or of behaving well. But the immediate cause, which involves the sponsor in the obligation to undergo such evil, is his own voluntary act of engaging under this condition.

It is evident, that what the sponsor suffers is owing to his own voluntary act, and not to the guilt of the criminal; because the measure of what he is to suffer is determined by his own engagement and not by the other's guilt. Whatever may be the guilt of the criminal; this consideration does not affect the sponsor: what he is to undergo is neither more nor less, than he voluntarily engaged to undergo. Upon this account it

is, that he, who thus gives security for another cannot forfeit his life, as a penalty ; when the conditions, that he engaged for, are not made good. He cannot forfeit his life, because he can forfeit no more, than he had pawned or pledged as a security : and he can pledge nothing, but what he has a right to dispose of. Now a man's life is not his own to dispose of : and consequently, as he cannot pledge it in security, he cannot forfeit it ; when the conditions, which he engaged for, fail of being performed. The ancients seem to have been of another opinion : the sponfor might in their judgment suffer capitally. And there is a plain reason why they might be of this opinion, notwithstanding they acted upon the principle here laid down, that the sponfor suffers immediately on account of his own engagement, and not on account of the criminal's guilt ; and consequently, that he can forfeit no more than he pledges, and can pledge no more, than he has a right to dispose of. For in the mean time they looked upon every man to be absolute master of his own life, not only to keep or preserve it, but to dispose of it too, as he pleased. They allow the sponfor therefore, if he thought fit, to put himself in all respects into the place of the criminal, so as to subject himself to suffer capitally ; if it appeared upon enquiry, that the criminal deserved so to suffer.

Obligation
to punish-
ment does
not desc-
end from
the ancest-
or to the
heir.

XVII. § We have already had occasion to observe, that the children or heirs of a criminal cannot justly be punished, upon account of the guilt of their parent or ancestor ; provided they have no share in this guilt. It may not be amiss, before we leave this subject, to take notice of the reason, why the obligation to undergo punishment does not, like some other obligations, descend from the ancestor to the heir. Guilt, or a disposition to do harm, is a personal quality ; and consequently the obligation, which arises from it,

must be merely personal. As the guilt is in the person and not in the goods ; the heir, to whom those goods descend, receives them without that obligation of punishment, which the ancestor was under. But though the heir stands clear of the punishment itself, that is, though if the punishment was not inflicted, or at least was not settled and determined, before the death of the ancestor, the heir will naturally not be liable to it ; yet if it was inflicted, or however was fixed, before his death, the heir will in consequence be affected by it, as far as it affects the goods of his ancestor. For the heir can receive these goods in no other condition, than the ancestor leaves them : so that if any fine or any forfeiture has diminished them, he can claim no more than the remainder : or if the fine or forfeiture has been settled in the ancestors life-time ; though the one has not been actually paid, nor the other actually seized on ; they are due from the goods of the ancestor ; the obligation no longer rests upon his person, but is extended to his property. Consequently the heir, to whom such property descends, receives it charged with this obligation, and is bound to give up what he can have no claim to, because his ancestor had none.

In explaining this matter I have supposed the heir to be affected by the consequence of the ancestors punishment, not only when the punishment of a fine or a forfeiture has been actually inflicted before the ancestor happens to die, as where the one is actually paid and the other actually seized upon ; but likewise when such punishment has been settled and determined, though it has not been actually inflicted. But in the liberty of nature this latter supposition cannot well take place : for where there is no common judge to decree the fine or forfeiture, they cannot easily be settled and determined any otherwise than by an actual payment of the former, or an actual seizure of the latter.

It may indeed possibly be otherwise ; the punisher and the criminal may by mutual agreement have settled this matter : and then the supposition will take place, even in the liberty of nature. Though the criminal has not actually been deprived of the possession of such goods, as he had agreed to give up in the way of punishment, or rather in the place of other punishment, yet the obligation arising from his crime is, by such agreement extended beyond his person, and affects his goods.

This may frequently happen in a state of civil society. After the magistrate has decreed the fine or forfeiture, whether the criminal directly agrees to it or not, they become due, so as to affect his goods, and to make the heir answerable ; if it should happen, that the sentence is not put in execution before the ancestors death.

C H A P. X I X.

Of War.

- I. *War, what it is.* II. *Private war what.* III. *War is naturally lawful.* IV. *Who may lawfully engage in making war.*

I. **W**AR^h is a contention by force. When we call War what it is. war a contention, we must not be understood to use this word in so restrained a sense as to mean by it only the act of contending. Nations are said to be at war with one another, not only when their armies are engaged, so as to be in the very act of contending ; but likewise when they have any matter of controversy or dispute subsisting between them, which they are determined to decide by the use of force, and have declared by words, or shewn by certain actions, that they are determined to decide it. War therefore, in the common use of the word, signifies not only an act but a state or condition. And upon this account the word contention, in this definition of war, is to be understood to signify the state or condition of those, who, though they are not actually making use of force, have some matter of dispute subsisting between them, which can be decided by no other means, and who are therefore determined to take every fair opportunity of using these means for the decision of it.

II. ⁱ If this is the notion of war ; it is plain that there Private war what. may be war, in the liberty of nature, before the institution of such civil societies, as we call nations. War of this sort is private war : because antecedently to the forming civil societies or bodies politic, which bodies are called public persons, the parties concerned in war

^h Grotius Lib. I. Cap. I. § 11.

ⁱ Grot. ibid.

must be private persons. Even after such public persons are formed, the right of private war is only abridged, and is not wholly taken away ; as will be shewn in its proper place.

Our principal enquiries at present are contained within a narrow compass : they are only these two ; first whether, in the liberty of nature, individuals may lawfully make war upon one another ; and secondly, supposing such war to be lawful, who are the persons that may lawfully engage in it.

War is naturally lawful.

III. ^k What has been proved already, concerning the right of defence, the right of recovering reparation for damages done, and the right of inflicting punishment, will serve to shew, that an injury will justify men in making use of force, both before and after it is committed. An injury justifies the use of force, before it is committed ; in order to guard against it : and it justifies a like use of force, after it is committed ; in order either to recover what is lost by it, or to hinder him, who has done it, from doing the like again. Now the use of force is war : and consequently the law of nature, since it allows the use of force for any of these purposes, allows of war.

Who may lawfully engage in making war.

IV. ^l Though the war, which we are now speaking of, is the war of individuals against each other ; yet the law of nature does not hinder any number of individuals from taking part in it. The person, whose interest is immediately concerned, either to defend himself and his property, or to recover reparation of damages, or to inflict punishment, is not the only person, who may lawfully make use of force for his own security. This has been proved already in the instance of inflicting punishment. For as the right of doing this belongs promiscuously to all, who may suffer by the criminal, if he is not restrained ; any num-

^k Grotius Lib. I. Cap. II. § I.

^l Grot. Lib. I. Cap. V.

ber of persons, where any one or some few of them have not force sufficient to inflict the punishment, may join their force together for this purpose: what is lawful to each of them separately is equally lawful to all of them, when they are thus united. In respect likewise of defence or of reparation, though it is more particularly the interest of him, who is in danger of suffering, or who actually has suffered, to guard against the injury in one case, or to enforce the demand of reparation in the other case; yet where he is engaged in such a lawful act, as either that of defending himself, or that of recovering damages, no rule of justice can forbid or restrain others from giving him their assistance. Nay where his sufferings are likely to be very great, or have been very great already, and his own abilities, either to ward off the evil, which threatens him, or to redress it, after it is over, are but small; benevolence would rather persuade those, who have an opportunity of being serviceable to him, not to refuse or withhold what help they are able to give him. From hence it appears, that war is lawful to two sorts of persons; either to him, whose interest is immediately concerned, or to them, who voluntarily give him assistance.

But there is still a third sort, concerning whom it may be enquired, how far they may lawfully engage in a war: and these are such, as have no interest in the occasion of it, and, if they were left to chuse for themselves, would take no part in it; but being under the authority of him, whose interest is immediately concerned, they are commanded by him to give their ~~assistance~~ assistance. The case of such persons, as these, will come more particularly under our consideration in the second part of this work, when we are to enquire into the effect of civil jurisdiction upon our

natural rights. Only we may here observe, by the way, that as a son, who continues in his fathers family, or a servant, who has bound himself by agreement for this purpose, is obliged to obey the lawful commands of the father or the master; the consequence is, that when such father or master undertakes a lawful war, the son or the servant may lawfully assist him, and are indeed obliged to assist him, if he commands them.

C H A P. XX.

Of Slavery.

- I. *Perfect despotism and perfect slavery what.* II. *Difference between despotism and parental power.* III. *No man is naturally a slave.* IV. *Causes of slavery.* V. *Limitations of despotism.* VI. *Slavery how the consequence of just war.* VII. *Children of slaves, why they follow the condition of their mother.*

I. ^m **G** Rotius, in defining perfect slavery, calls it an obligation to give all our labour for a supply of the bare necessaries of life.

Perfect
despotism,
and per-
fect
slavery
what.

But the common notion of perfect slavery does not seem to be fully expressed in this definition of it. We usually understand the master or owner to have, not only a right to direct such actions of the slave as may properly be called labour, but a right likewise to direct all his other actions. And from this right, to direct all the actions of the slave, there arises a right by gift or sale to dispose of the slaves person; that is, to transfer the power over him. For the slave, being supposed under the absolute authority and direction of his master, must, in consequence, be obliged to submit to the authority and direction of another, whenever his present master is pleased to order that it shall be so.

Perfect despotism seems therefore in the common notion of it, to be an alienable right to direct all the actions of another. And consequently perfect slavery is an obligation to submit to be thus directed.

Difference
between
despotism
and pa-
rental
power.

II. The different ends, to which the power of a master and the power of a parent are directed, will sufficiently distinguish them from one another: though both of them absolute; and though one of them extends to all the actions of the child, as the other extends to all the actions of the slave. The good of the child is the end, to which the authority of the parent over the child is directed: and the good of the master is the end, to which the authority of the master over the slave is directed. The parent has no right to command the child, but in view to the benefit of the child itself: the master has a right to command the slave to do such actions, as are for the masters benefit: so that however the slave may find his account in obeying his master's commands, this is merely accidental; since the masters right to give these commands has another purpose principally in view.

But though the master's power is not directed to the same end, and consequently is not tempered by the same limitations with parental authority, yet it is subject to several other limitations. We shall best understand what these limitations are, after we have considered the original of the master's power and the slaves subjection.

Limita-
tions of
despotism.

III. Though it may be possible for a man to be a slave from his birth; yet no man is naturally a slave. They who are slaves from their birth, must have been made such by some accident, which happened before they were born; slavery is by no means their natural condition. Nature has indeed made a difference between the parts and capacities of mankind: some are better able to judge for themselves, and to pursue their own good, than others: but though this difference of parts and capacities may have made it more convenient for some to be directed, and for others to direct; yet it cannot

possibly be looked upon as a sufficient reason, why the former should be slaves, and the latter be their absolute masters. Those, who stand in need of the direction of other men, and are willing to have recourse to such direction, stand in need of it for their own benefit, and are led to have recourse to it by the hopes of advancing that benefit. But slavery is an obligation upon a man to be directed in his actions, in view to their benefit, who direct him: it cannot therefore be founded in that difference of parts or abilities, which makes it convenient for him to have recourse to their direction, in view to his own benefit.

As men are naturally endowed with different degrees of understanding and judgment; so are they likewise naturally possessed of such different degrees of bodily strength, as will make it possible for one man, who is stronger, to subdue another, who is weaker, and force him to obedience. But whatever superiority in bodily strength we may be born to, though it gives us the physical power, it does not give us the right, of compelling another to obey us. The weak man's mind and his body, and consequently all the faculties of his mind, such as his judgment and his will, and likewise all the powers of his body, are as much as his own, as if nature had given him greater strength, and enabled him to make a more effectual struggle in his own defence. We cannot therefore claim a right to dictate to him, nor can we act, as if we had a right of forcing him, against his inclination, to pursue our interest in such manner as we shall direct, without doing him an injury, without doing violence to that judgment and will of his mind, and to those active powers of his body, which nature has made his own.

Children are born in a natural subjection to their parents. But this subjection, has been shewn already

to be, in its own nature, very different from slavery. And as it is distinguished from slavery by its nature, so likewise it is by its duration. The master's power over the slave is perpetual : the parent's authority over the child ceases ; when the child is able to think and to act for itself.

But if neither superior understanding, nor superior strength, nor parental authority, is a natural foundation of despotism ; we may safely conclude, that no man is naturally a slave : for there does not appear any other condition of human nature, which can possibly be imagined to give one man such an absolute right over another, as is implied in the notion of despotism.

We may form a general argument to shew, that nature gives no man a just title to despotism, upon the principles already made use of to shew, that no just title to it can arise from a superiority in bodily strength. If nature has made any thing a man's own, his mind and his body are so. At least it is evident, that whatever right one man has in his mind and body, another man must have the same right in his ; that is, as far as we can judge from any appearance in nature, each man has an equal right in his own mind and body respectively. But no man's mind and body can be his own, unless the faculties of both, that is, his judgment, his will, and his powers of acting are so. Now he, who has a right in his faculties of judging of chusing and of acting, is no slave. And since nature, which gave every man a right in his own mind and body, gave him a right likewise to these faculties ; the consequence is, that nature has not placed any man in a state of slavery.

Slavery
how the
consequence
of just war.

IV. But slavery, though it is not the natural state of any man, may be introduced consistently with the law of nature. First ; a man may come into a state of

slavery through the act of his parents. the law of nature obliges the parent to maintain their child. But it is possible for them to be in so low a condition, as to be absolutely unable to discharge this duty in their own person, and to be under a necessity either of suffering the child to perish, or of procuring some other person to discharge it for them. In these circumstances, if civil laws had made no better provision, the law of nature seems to allow them rather to put the child into the hands of any one, who would upon his own terms undertake to preserve its life, than to suffer it to perish for want of common necessaries. Nature indeed gave the parent authority over the child in view to the child's benefit : and he, who undertakes to maintain it and bring it up, upon condition of its being his slave, has his own benefit principally in view. It may therefore well be asked, whether the parents have authority to dispose of the child upon these terms. To this it may be answered, that the parents, through want and infirmity, being under a necessity of leaving their child to starve, or of accepting these conditions, provide for its benefit, as well as they can, by delivering it up to any person, who will undertake to subsist it even upon the condition of its being bound to act for his benefit, as long as it lives. There may however be a farther question, how it is possible for the temporary right of the parent over the child, to produce a perpetual right in the master over it as a slave. And undoubtedly, if there was no other cause of the masters power besides the parents act, the slavery of the child would cease, when it comes to years of discretion. As the authority of the parent ceases at that age, the power of the master, if it was derived solely from that authority, could subsist no longer. But the master undertakes from the first to maintain the child, in view to his

own benefit ; and consequently its maintenance is not to be considered as a bounty bestowed upon it by the master. If then he does not give the child its maintenance, the child must be his debtor for such maintenance : and, upon account of this debt, he claims a right to direct its future actions for his own benefit. Nor will the labour of the child, after it is grown up, discharge this debt, so as to redeem it from slavery : because its future labour will be due to its master for its future subsistence : and the original debt will upon this account still remain unsatisfied. This original debt may indeed be greater, than what arises from barely maintaining the child, whilst it was unable to work : for as the parents, though they were under a necessity of disposing of their child to some one, were at liberty to dispose of it to whom they pleased ; the master may have given them money to engage them to let him have the child, rather than any other person. And whatever he has thus paid to the parents is to be placed to the child's account, and becomes a part of the debt, which it owes to the master.

We may observe by the way, that when we speak of parents selling their child into slavery, nothing more can be meant by it, than that the purchaser, as we call him, gives the parents some valuable consideration to engage them to let him rather than any other person, acquire a right to the service of the child, by maintaining it in its infancy, whilst it is unable to earn its own living. For certainly as the child is not a slave to its parents, they can have no immediate right of making it a slave to any one else : nor can they, properly speaking, so sell it, as that the purchaser shall immediately by their act acquire a right to direct all the actions of the child for his own benefit.

Secondly; slavery may arise from a man's own consent. As the law of nature allows him to give another a temporary right to direct him in some of his actions by contract or agreement; so it will be difficult, if not impossible, to prove, that the same law does not allow him to make this right perpetual, and to extend it to all his actions. It is not very material to enquire whether any person has ever consented thus to part with his liberty: we are rather concerned to know what may be done of right, than what has been done in fact. And as every right, which a man is possessed of, may be alienated, if no law forbids him to alienate it; we may venture to conclude, that his liberty is alienable, in whole as well as in part, unless some law of nature could be produced, which, though it allows him in numberless instances to let out his service for hire, yet forbids him to make a slave of himself. It may perhaps be urged, that despotism implies a right to dispose of the life of the slave at pleasure, and to compel him to do such actions as the law of nature forbids; and that consequently, as no man has a right to dispose of his own life, or to do what is unlawful, he cannot give any one else such an authority over him, as is implied in the notion of despotism. But the ready way of answering this objection is to deny the first principle, that it proceeds upon. Despotism does not imply a right either to dispose of the slave's life at pleasure, or to compel him to do what the law of nature forbids. And the reason why it does not imply such a right, is the same which the objectors here give: no man is at liberty to dispose of his own life at pleasure, or to act contrary to the law of nature; and consequently no man can put his life into the arbitrary disposal of any one else, or subject himself to be compelled to do what the law of nature forbids. But

though a man cannot alienate a liberty, which he has not, it does not follow, that he cannot alienate a liberty which he has. And he who has alienated all the liberty, which he has, to some other person, makes himself a slave; whilst he, to whom it is so alienated, acquires such an absolute authority, as we call despotism.

Thirdly; slavery may arise from damages done; where the person who did it, has no other way of making reparation. The obligation to make reparation operates like a debt, and gives the creditor a right to direct all the actions of him, who has done the damage, to his own benefit; if this is the only way, in which he can obtain satisfaction for the damage sustained. But suppose the debtor's labour will be of no use to the creditor, yet the obligation to make reparation will still subsist: and if this obligation can be satisfied in any other way, either in whole or in part, the creditor has a right to demand such satisfaction. Now though the debtor's labour would be of no service to the creditor himself, yet it may be serviceable to some other person, who would be willing to pay for a right to demand this labour. And as the creditors damages may, at least in part, be repaired, though not by using the debtor as his own slave, yet by selling him for a slave to the person, who wants him; the right to demand reparation would for this reason terminate in a right so to sell the debtor; where this is the only way, in which the creditor could obtain any reparation.

Fourthly; slavery may be produced by guilt, consistently with the law of nature. Amongst the other methods of restraining a criminal from offending again, this is one: he will have few opportunities of offending, where all his actions are under the absolute authority and control of another. And this loss of liberty may be either temporary or perpetual, according as the

guilt of the criminal deserves a less or a greater penalty. The punishment of a criminal may likewise end in slavery, where the guilt is such as to deserve death. They, who are to punish him, may, if they find it proper, remit the rigour of the penalty, and give him his life, upon condition of his becoming their slave.

V. From whichever of these causes slavery begins, it does not appear, that the master, merely upon account of that right, which we call despotism, has a right to dispose of the slaves life at pleasure. Limitations of despotism.

When slavery is derived from the act of the slaves parents; it is certain, that act cannot immediately and in itself, give the master any arbitrary right over the life of the slave. The parents themselves had originally no right of this sort : and they cannot give a right to another, which they themselves never were possessed of. Perpetual slavery, where the parents sell the child, is produced indeed, as we have just now seen, not by the immediate act of the parents, but by the debt, which the child contracts, before it is able to earn its livelihood. And that this debt cannot give the master any power to dispose of the slaves life at pleasure, will plainly appear, when we have considered the effect of slavery, arising from damage done or a debt contracted.

Secondly; slavery, arising from a man's own consent, gives the master no absolute power over the life of the slave. The slave could not by his own act give the master any power, which he himself was not possessed of; and no man has a right to dispose of his own life at pleasure.

Thirdly; though damages done or debts contracted, as they give the creditor a right to every valuable consideration in the debtor's power, may by this means end in slavery; yet they give the creditor no absolute right

over the life of the debtor. His life is indeed a valuable consideration to himself: if he loses it, he loses what is of the greatest value to him. But it is no valuable consideration to the creditor; that is, the creditor by taking it from him would gain nothing. The law of nature therefore, notwithstanding it gives the creditor a right to whatever may satisfy his demand, can give him no right to the life of his debtor. He has a claim to whatever he can get from the debtor, which may be beneficial to himself, till his damages are fully repaired. But then his claim extends no farther: it does not extend to a right of taking what the debtor will be hurt by losing; if what is so taken will not help towards making him amends for the damages, which he has sustained. One might here ask, how the imprisonment of a debtor, for no use or purpose whatsoever, can be reconciled to the law of nature. He may indeed lose his liberty by being confined to work for the benefit of his creditor: because this is an amends for the damages, which he has done, or for the debt, which he owes. But the loss of liberty, if it is merely confinement in a prison, is no more a satisfaction for damages, than the loss of life would be. Where men live in civil society, if the debt by the instituted laws of the society will not give a full claim upon the debtor's lands, but only upon his moveable goods; in these circumstances, if the debtor has no moveable goods, and refuses to pay out of his lands what he owes; imprisonment may be a very proper way to bring him to a proper sense of his duty, and to make him willing to give up his lands in payment. But if he has neither lands nor moveable goods; such imprisonment seems to have but little foundation in natural justice. And yet in a country where slavery is unknown, and imprisonment for debt is frequent, the prejudices that men have been brought up in, will probably make them wonder to hear, that slavery is a more natural and

a more reasonable consequence of damage, or of debt, than imprisonment.

Fourthly ; if slavery is the punishment of a crime, which deserves no higher punishment ; the power of the master or punisher stops here : it would be unjust to inflict death, where the proper punishment is slavery. The master therefore has in this case no absolute right over the life of the slave. Indeed where the crime deserves capital punishment, the person, who inflicts the punishment, has in the first instance a right over the criminal's life, to take it away, if he pleases. But if he has agreed to mitigate the punishment, by changing it into slavery, this right is at an end : he parts with this right by consenting to take the criminal as his slave. So that even in this case, though the punisher had originally a right over the life of the criminal, yet the master will have no right over the life of the slave.

It is no objection to what is here advanced, that if a slave commits a capital offence, his master will have a right to punish him with death. This right belongs to him as a man, and not as the master of the slave. Any one has the same right over the slave, in this respect, that the master has : and if the master is to be employed, rather than any one else, in inflicting the punishment ; it is only because he has a better opportunity of doing it, than any one else, as the slave is in his custody.

We need not be particular in proving, what has been mentioned above, that despotism gives no right to the master of compelling the slave to do any act, which the law of nature forbids. A mans own consent, the obligation to repair damages, or the obligation to undergo punishment, are the natural occasions of slavery : and it cannot be thought, that the master can derive such a right from any of these principles.

We may indeed prove by a general argument, that it is impossible for him to have such a right. The law of nature cannot allow any person a right of forcing another to disobey its own precepts: every pretence therefore of the master to such a right is inconsistent with the law of nature.

Perfect slavery seems in its own nature to put an end to property; at least it will make the slaves property worth nothing. For if he is bound in all his actions to work for his masters benefit, if the master has a right to direct him to this purpose in whatever he does; he can neither keep, nor use, nor dispose of any goods, either moveable or immoveable, for his own benefit, or at his own discretion, but only for the benefit and at the discretion of his master.

However, if his master has allowed him to have property; his property held under such allowance is not rendered precarious, merely by his being a slave. The goods, which he has acquired, are as much his own to keep, to use, and to dispose of, as if he had been free. In effect the allowance of having goods of his own is a grant of so much of his liberty as is necessary for these purposes: the very notion of his having property in such goods implies, that he has this liberty in its fullest extent; unless the master, when he allowed him to have goods of his own, has made some express reserve, so as to abridge this liberty.

The consequence of this is, that, when the slave dies, he may give his goods away by will; or if intestate succession has been received in the place where he lives, they will descend to his heir, and the master will have no claim to them; unless he has expressly taken care to reserve such a claim. It may happen indeed, that his children are slaves; and for this reason are unable to claim either under his will, or in intestate

succession. But then it is their incapacity, which prevents them from claiming, and not any defect in his right, to whom the goods belonged.

VI. From what has been said concerning the origin of slavery, we may see in what manner it may arise from a just war.

Slavery
how the
consequence of
just war.

It is lawful to make use of force either to recover satisfaction for damages sustained, or to inflict punishment upon such as have deserved to be punished. And since the slavery of the party who has done the injury may be the only satisfaction that can be obtained for the damage, which he has done, or may be the proper punishment of his guilt, a just war may end in slavery. Despotism may thus be the consequence of conquest.

But then the power of the conqueror does not arise immediately from conquest: he has no right to command the vanquished to act for his benefit, merely because he happens to be stronger than they are, and has subdued them. Those, who call war an appeal toⁿ heaven, have given too much countenance to this opinion. It is obvious to conclude, if war is an appeal to heaven, that victory is a divine decision in favour of the conqueror: and the probable inference from hence would be, that he has I know not what divine right of despotism over the vanquished, without considering whether he had any original right to make use of force at all. Whereas in truth, though despotism may follow victory, the right of the conqueror over the vanquished does not arise immediately from victory: he must have had this right before, or his superior strength could never have given him it. All that his strength can do is to enforce his claim of damages, or his right of punishment. This claim or this right might have been unjustly prevented from taking place, if his adversaries had happened to be stronger than he is. And if, when

ⁿ Locks works V. II. p. 179. 225.

it is said, that conquest gives a right to despotism, all that is meant by it is, that it supports a right, which might otherwise have been hindered from obtaining its effect, the expression must be allowed to be at least very inaccurate.

Slavery produced by an unjust war is a manifest injury, notwithstanding such war is attended with conquest. The slaves, however they may be subdued, and be forcibly deprived of their liberty, continue in a state of war with their conqueror. They have still a right to their liberty, and may assert that right, whenever they have an opportunity.

If indeed his victory has been followed by any express agreement between him and them, to confirm to him what, in the first instance, was obtained unjustly; such agreement may be binding. But it will certainly be no otherwise binding, that upon supposition, that the unjust force was removed. If the same unjust force, by which they were subdued at first, is made use of afterwards to extort their consent, such agreement will be a nullity. An express agreement is necessary, even if the unjust force is removed: long submission, without any efforts to free themselves from slavery, will not give the conqueror a claim by prescription; since no prescription can take place, where the original possession was unjust.

The reader should observe, that the war and the despotism, which we have here been speaking of, are private war in a state of nature, and private despotism or the power of a master over his slave. The effects of conquest in respect of civil power will come more properly under consideration in another place.

Children
of slaves
why they
follow the
condition
of their
mother.

VII. ° Since liberty is the natural state of mankind, it may be asked whether the children of slaves are free? to which we may answer, that if it is otherwise, if

“ Grot. *ibid.* § XXIX.

the children of slaves are not free, the slavery of such children is not entailed upon them by nature ; it is not derived from their parents, as their temper, their constitution, or their complexion sometimes are : some other principle, besides the condition of their parents, will be necessary to explain their slavery.

If the condition of the parent is the occasion of the child's slavery, it is only the remote occasion of it ; some other accident is the immediate cause, which deprives them of their liberty. When a child, which has been sold by its parents, is grown up, and is itself become a parent, its offspring, unless disposed of in the same manner as the parent was, is not affected by what was done long before its birth, and so done as not to include its liberty in the bargain.

When a man enslaves himself, Grotius contends, that he may at the same time enslave his future children, if he has no other possible way of providing for them. But then those children are slaves ; not merely because their parents are so, nor indeed because their parents have thus disposed of them ; but by another accident, which has been already explained at large. However, slavery thus produced must stop here : the children's children will not be affected by what has passed between the master and their remote parents ; and in respect of them the question will return, whether they are slaves or not ; and if they are, what made them so ?

Thus slavery arising either from the act of a man's parents, or from his own act, will not descend to his remote offspring : and much less will it descend to them, when it is a satisfaction made for damages, which he has done, or a punishment of any crime, which he has committed. The child of a man, who has injured another, may be bound to make reparation ; because

the obligation to make reparation affects, not only the person, but the goods likewise of him, who did the damage ; and the child by taking the goods is involved in all the obligations, with which those goods are charged. But where there are no goods, or what goods there are will not be sufficient to make reparation ; that is, as far as the obligation affected only the person of him, who did the damage, so as to subject him to slavery ; the child, if it was neither a principal nor an accessory, is no way involved in that obligation. We have seen, upon another occasion, that guilt is a personal quality ; and consequently, that, if the child stands clear of the parents guilt, it cannot justly share in the slavery, or in any other punishment, which is inflicted on the parent.

Nor can it here be objected ; that, as the child may justly lose those goods, which, if the parent had not been deprived of them, would have descended to it ; so it may for the same reasons be deprived of that liberty, which, if the parent had been innocent, would have been its birthright. These two cases are widely different from one another. Liberty is the child's right ; the parents goods are only its conditional expectancy. Though we may therefore justify cutting off the child's expectancy, where it had no right ; we cannot, upon the same principles, nor upon any other, justify taking from it what is properly and strictly its own.

If then none of all the ways, by which despotism over the parents is acquired, will naturally affect the children, we are still to enquire by what accident the slavery of the parent should make them slaves. Grotius, to make this enquiry more easy, supposes both the parents to be slaves. The child then, he says, as soon

as it is born, is maintained at the expence of their master, before it is able to earn its own livelihood by its work. By this maintenance the child contracts a debt, which its future work cannot discharge; because its future work will be due for its future maintenance. This debt therefore will remain as long as it lives, and will give the master of the parents a right to every valuable consideration in the child's power.

Our author's principle, as here explained, may perhaps account for the child's slavery, after it is once in the master's power. But the enquiry may be carried one step farther back, by asking, how the child comes to be a slave rather to the master of the parents, than to any other person; since any other person seems to have as good a claim, upon this principle, as he has, to undertake the maintenance of the child, in view to the benefit, which may arise from its service? And in truth, Grotius has not shewn, either that the master of the child's parents, or that any other person has such a claim. As far as appears from what he lays down as the foundation of the child's slavery, it is as much in a state of freedom at the time of its birth, as it would have been upon supposition, that neither of the parents were slaves.

We cannot indeed maintain on the contrary, that the children of slaves are naturally born slaves: but there seems to be an accident previous to their birth, which fixes them to this condition. If the mother is a slave, her owner, during the time of gestation, and during the time of her illness occasioned by the birth, loses her work, and is likewise at an extraordinary expence in taking care of her. As this loss and these expences are owing to the child, they make it from its birth a debtor to the mother's master; and upon this account he has an immediate claim to every valuable consideration, that he can receive from the child, as far

as this debt extends. It is a slave therefore from the beginning, not because the slavery of the parent naturally entails slavery upon it, but because the slavery of the mother made the child from the beginning a debtor to her owner.

The original debt is indeed increased by its maintenance during its infancy; and in this respect the principle laid down by Grotius has some effect in its future slavery: though this principle is not sufficient in itself to explain the occasion of its coming at first into this state.

From hence we may see the reasons why the offspring should naturally follow the condition of the mother, and not of the father: why, if the mother is a slave, the child will be so, though the father is free; and why if she is free, the child will be so, though he is a slave. For if she is free, no one has any property in her work, nor is put to any extraordinary expence upon her account, so as to acquire any original claim upon the child. In another respect likewise the child follows the mother: it belongs to her master, if she and the father are both slaves, and have different masters. For the loss of her work and the extraordinary expence, which the child occasions, during the time of gestation and birth, fall upon the master of the mother and not upon the master of the father.

It was necessary to say thus much concerning slavery, that we may be enabled in the following book to distinguish this sort of subjection from civil subjection, and private despotism from civil power.

We have been hitherto employed in considering the rights and obligations of mankind, the principles from whence they are derived, and the rules, by which they governed, in the liberty of nature. And though mankind are at present united into distinct civil communities,

yet these points are not now become matter of mere speculative amusement, but are still as necessary to be known, in order to ascertain our respective rights and obligations, as if we had continued to live in a state of nature.

For first; though mankind are now united into civil communities, and are become subject to the positive laws of such communities, so that these laws are in most instances the support of their rights, and the measure of their obligations; yet all mankind are not united into one and the same civil community; they are not all subject to the same positive laws; and consequently these laws cannot ascertain all their claims, or regulate their conduct in all instances. Not only different civil societies, when each society is considered as one collective person or body politic, but likewise individuals, who are members of different civil societies, are still in the liberty of nature, and must have recourse to that law of nature, which respects mankind, as they are individuals, in order to determine what is just and fit to be done in respect of one another.

Secondly; even they, who are members of the same society are upon many occasions left to their natural liberty: sometimes because the civil laws of that society, either through their silence or their imperfection, have not provided for the case in question: sometime because either an express or an equitable permission has replaced them, as it were, in a state of nature, and given them leave to defend themselves, when the danger, which threatens them, is so imminent, as to make it impossible for the civil laws to come in to their assistance: sometimes because the civil laws, from the apprehension that some rights, which are acquired consistently with the law of nature, might be abused; would set such rights and their correspondent obligations aside, provided the per-

sons so obliged think proper to be released from them: but those persons are left in the mean time to judge for themselves, whether in good conscience they ought to comply with such obligations or not.

Thirdly ; civil laws are in some particulars transcripts of the law of nature ; they are only such rules, as individuals, in the liberty of nature, are obliged to observe in their conduct towards one another. An acquaintance therefore with these rules will be of great use towards enabling us to understand such laws rightly, and to apply them properly.

Fourthly ; in interpreting and applying civil laws, when they are not mere transcripts of the law of nature, as it respects individuals in a state of natural liberty, a thorough knowledge of this law is commonly necessary : because though civil laws derive their obligation from civil authority ; yet this authority does not always settle the precise manner of their operation in each particular case, but leaves them to operate according to the nature and reason of things.

Fifthly ; as the authority, by which civil laws themselves are established, is derived from the consent of those, who are subject to such laws ; it will be necessary to inform ourselves of the right and obligations of mankind, as they are individuals ; not only that we may trace out the origin of this authority, but that we may understand the nature and settle the extent of it, may determine what adventitious rights and obligations are introduced, what original rights and obligations are either superseded or altered, and in what manner either of these effects are naturally produced by it.







